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Minor Courts, Major Questions

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Minor Courts, Major Questions

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*Seth Davis***

In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., the Supreme Court deferred to an agency's controversial interpretation of a key provision of a regulatory statute. Lower courts now apply "Chevron deference" as a matter of course, upholding agencies' reasonable interpretations of ambiguous provisions within the statutes they administer. Recently, however, the Court refused in King v. Burwell to defer to an agency's answer to a statutory question, citing the "deep economic and political significance" of the question itself. The Court in King offered barebones guidance regarding the scope of and rationales for embracing this so-called "major questions exception" to Chevron deference, and the decision has thus created uncertainty regarding Chevron's application in the courts below. Surveying the post-King landscape, we advance in this Article a simple and straightforward proposal designed to ameliorate the confusion that King has wrought. Our proposal is that only the Supreme

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Court should apply the major questions exception: absent further instruction from the Court, neither the federal district courts nor the U.S. courts of appeals should withhold Chevron deference on grounds of majoriness alone. Our argument stems from a comparative institutional analysis of the Court and its subordinates, coupled with an unpacking of the various policies and purposes that the major questions exception might serve. These investigations yield the surprising conclusion that only the Court has the institutional capacity to realize the exception's benefits, whereas all the federal courts would realize its costs. That being so, we believe the most sensible means of implementing the major questions exception would be to treat it as the exclusive province of the Supreme Court.

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INTRODUCTION

Some questions of statutory interpretation are too important for federal agencies to answer. At least, that seems to be the lesson of *King v. Burwell*, in which the Supreme Court held that the *Chevron* doctrine did not apply to a statutory “question of deep ‘economic and political significance’” that was “central” to one of the most controversial pieces of legislation in recent memory, the Patient Protection and Affordable Care Act (“ACA”).¹ That question, the Court held, instead warranted a form of de novo review that was uninfluenced by the agency’s interpretive position.² *King* has thus been said to support a so-called “major questions exception” (“MQE”) to the *Chevron* rule,³ which withholds from agencies the power to resolve statutory ambiguities where the political and/or economic stakes are especially high.

The Court has not revisited the MQE in the two or so years since *King* was decided. But the exception has not lain dormant in the courts below. Litigants have brought the MQE to the attention of both district and circuit court judges, and these judges have already rendered opinions that rely on *King*’s formulation of the MQE.⁴ Many lower court opinions, to be sure, continue to apply *Chevron* without any discussion of the “majorness” (and hence *Chevron*-eligibility) of the statutory questions under consideration. But the post-*King* lower court cases reveal that judges and litigants in the courts below regard the MQE as an operative and revitalized component of the law that they apply.

That outlook, however, is misguided, and this Article attempts to explain why. *King* notwithstanding, the lower courts should *not apply the MQE*. Rather, the exception should exist as a tool for the Supreme Court and only the Supreme Court to use, and lower courts should therefore never ask whether a given question qualifies as “minor” enough for *Chevron* or “major” enough for some other standard of review. Our thesis, in other words, is that a question should not qualify

1. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). At issue was the meaning of Section 36B of the Internal Revenue Code, as amended by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

2. *See King*, 135 S. Ct. at 2489.

3. *Chevron*’s famous two-step test goes like this: First, a court must apply the ordinary tools of statutory construction to decide “whether Congress has directly spoken to the precise question at issue.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Where Congress has been clear, the court must give effect to its unambiguous intent. *Id.* at 842–43. If, however, the “statute is silent or ambiguous with respect to the specific issue,” *Chevron*’s second step requires the court to ask “whether the agency’s answer is based on a permissible construction . . .” *Id.*

4. *See infra* notes 92–103 and accompanying text.

as “major” unless and until the Court has granted certiorari to resolve it.

In advancing this claim, we take no position on the overall desirability of the MQE as a *Chevron*-limiting tool.⁵ Regardless of how one feels about what the Court did in *King*, one should prefer a regime in which only the Court applies the MQE to a regime in which all federal courts do the same. The MQE’s opponents should favor our proposal as a principled, “second-best” alternative to a world without *King*, and the MQE’s proponents should favor our proposal as the most cost-effective means of implementing the MQE’s animating goals. Our proposed regime of “Supreme Court exclusivity,” it seems to us, is one that both sides of this debate should endorse.⁶

More specifically, we believe that our proposed rule would achieve the benefits of the MQE while avoiding unnecessary costs. If the lower courts are to apply the MQE, then the Court must define what makes a question “major.” But the *King* Court did not define “major questions,” and we think that’s because there’s no easy way to articulate the contours of any such requirement. More likely, the Court knows a major question when it sees it, applying an all-things-considered judgment based upon, as in *King*, a felt sense of the legal and political times. Our proposed rule thus significantly reduces the decision costs of defining and applying the MQE, and it eliminates the potential for lower courts to err while invoking the exception and refusing to defer to agencies under *Chevron*.

At the same time, our rule would leave undisturbed the potential benefits that the MQE might confer. The Court has provided little guidance about the values that justify the MQE. One of our aims, therefore, is to take stock of the potential rationales for the MQE and

5. *King* and its predecessor cases have their fair share of detractors, and we are not unsympathetic to the criticisms that these detractors have raised. See, e.g., Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006). At the same time, we also develop potential justifications for the MQE that encompass *King* as well as major questions cases that other commentators have discussed. See, e.g., Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761 (2007); Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008).

6. While we need not take a position on *King*’s MQE as an exception to *Chevron*, our thesis reflects two assumptions about *Chevron*. First, we believe that *Chevron* is not inconsistent with the judicial duty to say what the law is. Cf. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983). Second, as discussed *infra* notes 155–156 and accompanying text, we think that one of *Chevron*’s virtues is that it reduces the costs of deciding agency cases for lower courts, and our proposal seeks to maintain this cost-economizing function by directing lower courts not to wrestle with “majorness” when deciding whether to apply *Chevron*. See Thomas W. Merrill, *Step Zero After City of Arlington*, 83 FORDHAM L. REV. 753, 753 (2014) (“*Chevron*’s appeal for the courts rests in significant part on its ease of application as a decisional device.”).

to ask whether any of those rationales would require active lower court involvement in the MQE's implementation. Surprisingly, our answer to this question is "no"; all of the goals that we attribute to the MQE are goals that only the Supreme Court is well situated to achieve. Thus, even if one accepts the MQE as a worthwhile doctrinal project, one stands to gain little from calling upon lower court judges to join the Justices in the project's pursuit.

Our analysis contributes to administrative law practice and scholarship in four distinct ways. First, we attempt to bring both descriptive and prescriptive clarity to the *doctrinal* world that *King* has created. Descriptively, we aim to show that the Court in *King* broke significant new ground, according to majorness a much more consequential role than did any of *King's* predecessor cases. *King* did not so much embellish upon the Court's previous "major question" decisions,⁷ as it introduced a brand new formulation into the mix. *King's* expansive recharacterization of the MQE raises important questions about how lower courts should apply the exception going forward. And to that set of questions, our prescriptive contribution offers a simple yet satisfactory solution: lower courts should assume that all statutory questions qualify as "minor," leaving it to the Court and the Court alone to identify the "extraordinary" set of cases in which that presumption should not apply.

The second contribution of our Article is *conceptual*. The positive case for Supreme Court exclusivity depends on an accounting of the goals and objectives of the MQE itself. *King* proves cryptic on this point. Aside from a terse (and dubious) argument about congressional intent, the Court provided no justification for its decision to ignore the agency's reading of the "economic[ally] and political[ly] significan[t]"⁸ statute at issue. We thus attempt to fill this theoretical void by considering other potential rationales for the MQE: perhaps, for instance, the MQE indirectly polices the limits of the nondelegation doctrine;⁹ perhaps it

7. See, e.g., *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218 (1994).

8. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

9. See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (exploring whether the nondelegation values might be enforced through the major questions canon as a means of constitutional avoidance). The nondelegation doctrine holds that Congress may not delegate "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). It has been sparingly enforced and is the subject of an extensive scholarly commentary. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994) (arguing "that the core of the Constitution's nondelegation principle can be expressed as follows: Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them"); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L.

fosters democratic accountability by channeling resolution of the question to a highly visible and widely monitored public institution;¹⁰ or perhaps it facilitates the long-term settlement of contentious political debates that would otherwise continue unabated.¹¹ The jury is still out, of course, as to whether these rationales (either in isolation or in combination) provide a sufficient justification for the exception's existence, and our Article does not purport to offer any definitive resolutions one way or the other. But in developing a deeper examination of the MQE's theoretical premises, we hope to enrich the discussion as to whether—and, if so, when—those premises make sense.

The Article's third contribution is *methodological*. We are well aware of our proposal's seemingly unusual (and some might say provocative) nature: in advocating that lower courts never apply an exception that the Court sometimes applies, we are calling for the deployment of different review standards at different levels of a unitary federal court system. That's not typically how things work; instead, when the Court applies a rule, lower federal courts can, do, and should apply that same rule in an undifferentiated fashion. Our proposal runs contrary to that tradition, but we do not view this as a bad thing.

When it comes to separation of powers questions, the judicial branch is not—or at least should not be understood as—a single, undifferentiated “black box.” Rather, it consists of different and distinctive institutions with different and distinctive institutional features. It is for this reason that we accept Professor Aaron-Andrew Bruhl's recent invitation to consider “hierarchically variable deference to agency interpretations,” with degrees of deference varying depending

REV. 1721, 1723 (2002) (contending that there is “no constitutional warrant” for nondelegation limits).

10. An extensive literature evaluates administrative law by considering whether it fosters political accountability. See Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 186–87 (2014) (considering literature and arguing that too much accountability can be undesirable); see also Edward H. Stiglitz, *Unitary Innovations and Political Accountability*, 99 CORNELL L. REV. 1133, 1136–37 (2014) (discussing literature). In Part II.A.3, we shift to focus on *salience* rather than the more abstract conception of *accountability*, asking whether the MQE might make controversial legal questions more salient to voters and legislators. One of our contributions is thus to encourage greater precision in our evaluation of administrative law in terms of “accountability.” Cf. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073–74 (2005) (noting that “accountability . . . is used in a variety of different ways”).

11. By shifting major questions from the executive branch, which changes hands at least every eight years, to the Court, the MQE might facilitate settlement of regulatory questions that are particularly likely to be politically controversial. This settlement might be seen as either intrinsically or instrumentally valuable. See, e.g., Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1054 (2013) (discussing settlement as a “core function of law and courts”).

on a reviewing court's place within the Article III hierarchy.¹² Indeed, we think that whether one is thinking specifically about our proposal involving the MQE, more generally about the problem of judicial review of agency action, or even more generally still about the role of the judicial branch in a system of separated powers, one should take seriously the possibility of assigning to different *types* of federal courts differentiated approaches to reviewing government action.¹³ Our analysis here, we hope, will help to highlight the merits of this idea.

The Article's fourth and final contribution is *normative*. The internal logic of our proposal, we believe, follows naturally from the presumptions underlying both the *Chevron* rule and the immediately apparent rationales for exempting "major" questions from the ambit of that rule. But, as we argue in the Article's concluding Part, the rise of polarization, hyperpartisanship, and authoritarianism within the political sphere requires further thinking about these presumptions and rationales themselves. That seems especially so, we think, in light of the 2016 presidential election, in which Donald Trump campaigned on a threat to "jail" his Democratic opponent Hillary Clinton,¹⁴ a ban on the immigration of Muslims to the United States,¹⁵ and a promise immediately to deport two to three million undocumented immigrants, among other things, and in which fellow members of the Republican party signaled little willingness to resist the President's alarming agenda. We do not yet know how the Trump administration will utilize

12. Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727 (2013) [hereinafter Bruhl, *Hierarchically Variable Deference*]; see also Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How To Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 482–84 (2012). Drawing upon Peter Strauss's insights into the disciplining effect of *Chevron* on lower courts, Richard Pierce has suggested the possibility of "[r]educ[ing] or eliminat[ing] deference in Supreme Court decisionmaking . . . [while] retain[ing]" *Chevron* for the circuit courts. Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293, 1313–14 (2016) (citing Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121–35 (1987)). For further discussion, see *infra* note 157.

13. For the related suggestion that various areas of public law doctrine already pursue this strategy of "vertical disaggregation" in an indirect fashion, see Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211, 1287–89 (2014).

14. Bridgette Dunlap, *Trump's Open Disdain for the Rule of Law*, ROLLING STONE (Oct. 11, 2016), <http://www.rollingstone.com/politics/features/trumps-open-disdain-for-the-rule-of-law-w444093> [https://perma.cc/X6N8-78XW] (discussing Donald Trump's statement at a presidential debate that Clinton would "be in jail" under a Trump presidency).

15. Adam Liptak, *Donald Trump Could Threaten U.S. Rule of Law, Scholars Say*, N.Y. TIMES (June 3, 2016), <http://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html> [https://perma.cc/FNK8-ZWFU] (noting Donald Trump's promise to ban Muslim immigration to the United States).

agencies in the service of its goals,¹⁶ but it is by no means difficult to imagine agencies in the Trump administration eschewing interpretive judgment and policy-based expertise altogether in favor of the raw and opportunistic exercise of power, with little regard for norms and conventions that have traditionally cabined its use. We thus conclude the Article by considering ways in which the *Chevron* test might be modified to account for the prospect of severe dysfunction within the scheme of separated powers. In particular, we imagine a variation on the MQE that might permit the case-specific withholding of deference on dysfunction-related grounds, and we consider the particular role that lower courts might play in applying such a “major dysfunctions” exception to the *Chevron* rule.

The Article proceeds as follows. Part I sets the legal backdrop and advances our descriptive claim that the Court in *King* recast the major questions exception in a major doctrinal way. Part II then defends our prescriptive thesis that the MQE—as set forth in *King*—should apply only in cases that the Supreme Court has decided to hear.¹⁷ We advance this claim in two Subsections. First, we argue that the MQE’s underlying values are ones that lower courts are not well positioned to vindicate. Second, we contend that lower court application of the MQE would impose unnecessary costs on a variety of different institutional actors, including but not limited to the lower courts themselves. Therefore, we ultimately conclude that lower court application of the MQE is pointless at best and harmful at worst, while an alternative “hands-off” approach to the MQE would be useful at best and harmless at worst.¹⁸ Part III considers and responds to several potential objections to our proposal, including, among other things, the concern that it adversely affects the “percolation” of questions in the lower courts, the concern that it disrupts reliance interests, and the concern that it too cavalierly invites lower court defiance of the Supreme Court’s commands. The key point is simply this: whatever duty the Court wants to assume to decide “major” regulatory questions for itself, the lower courts would do no harm (and perhaps even some good) by leaving the MQE to the Court alone.

Part IV then uses the MQE (and the case law underlying it) as a launching pad for considering broader questions about the future of

16. Substantive edits to this Article were completed as of December 2016, meaning that the foregoing analysis does not take account of any events occurring during the early months of the Trump presidency.

17. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

18. For a discussion of these arguments as applied to the D.C. Circuit, which plays a unique role in administrative law, see *infra* note 114.

Chevron in an age of political dysfunction.¹⁹ In applying the MQE, the Court has occasionally adverted to concerns about procedural irregularity, hyperpartisanship, and executive overreach as bolstering its hesitance to apply *Chevron* in its pure, unvarnished form, and it is thus worth considering how those concerns might be more explicitly translated into a dysfunction-based exception to *Chevron* itself.²⁰ It is also worth asking whether such an exception might accommodate increased lower court involvement in realizing its animating goals. In other words, if the relevant exception were triggered not by the substantive “majorness” of a statutory question but instead by indicators of dysfunctional partisan politics, would a program of Supreme Court exclusivity continue to make sense? In our view, acknowledging the heterogeneity of the federal judiciary will facilitate careful thinking about this particular question and, more broadly, the future of administrative law.

I. THE “MAJOR QUESTIONS” EXCEPTION

This Part argues that *King v. Burwell* changed the law by establishing an exception to *Chevron* that treats a court’s independent judgment about the significance of a statutory question as a threshold reason not to apply *Chevron*.²¹ The Supreme Court’s pre-*King* cases

19. Our aim is to think about the “place of agencies” and courts in a time of partisanship, a concern of a recent and growing body of scholarship. See generally Cynthia R. Farina & Gillian E. Metzger, *Introduction: The Place of Agencies in Polarized Government*, 115 COLUM. L. REV. 1683 (2015). And our central contribution to this conversation is to open up the black box of the judiciary to argue that concerns about partisanship and divided government might lead us to treat the Court and the lower courts differently. Whether more aggressive judicial review is a solution to the ills of partisanship in the political branches is, of course, debatable. See, e.g., Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 8–9 (2014); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 63–64 (2015); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1758 (2012); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1777–79 (2015). But we hope at least to contribute to this debate by drawing attention to the possibility of designing solutions in a way that acknowledges and responds to relevant institutional distinctions within the federal judicial branch.

20. This dysfunctions-based account owes—dare we say it—a major debt to Bressman, *supra* note 5, at 765, who argued that the Court’s decisions in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *Gonzales v. Oregon*, 546 U.S. 243 (2006), might be explained by a requirement that agencies exercise their lawmaking authority “in a democratically reasonable fashion.”

21. Other commentators have noted *King*’s departure from the previous major questions cases. See Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1869 (2015) (“Strikingly, the magnitude of the issue did not simply keep the Court in ‘step one’ of *Chevron*, it induced the Court to jettison *Chevron* altogether.”); Stefanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 40 (suggesting that *King*’s

treated the political and economic significance of an agency's stated *position* as one among many factors to consider when applying *Chevron*, at most hinting that concerns about "majoriness" might remove a case from the *Chevron* framework altogether. In *King*, by contrast, the Court considered the "majoriness" of the question without reference to the particular answer the agency had given, and concluded in a terse paragraph that the question itself was too important for the agency to answer. Thus (re)formulated, the MQE casts significant uncertainty over *Chevron*'s future in the courts below.

To develop these points, this Part begins by sketching the *Chevron* framework. It then describes the major questions doctrine prior to *King*, focusing upon the Court's previous invocations of the majoriness factor at Steps One or Two of the *Chevron* analysis. The analysis then describes *King*'s alternative, "Step Zero"-based formulation of the MQE, highlighting the important differences between *King* and its predecessor cases.

A. The Chevron Framework

Unlike the MQE, the *Chevron* framework is simple to describe.²² At Step One, a court applies the ordinary tools of statutory construction to decide "whether Congress has directly spoken to the precise question at issue."²³ Where Congress has been clear, the court "must give effect to [its] unambiguously expressed intent."²⁴ If the statute is ambiguous, the court moves to Step Two and must defer to an agency position that "is based on a permissible construction of the statute."²⁵

Chevron emphasized two rationales for assigning primary interpretive authority to agencies rather than to courts in cases of statutory ambiguity. First, federal courts lack an agency's expertise in policymaking.²⁶ Second, agencies, though "not directly accountable to the people," are more politically accountable than the federal courts.²⁷ Eventually, courts and commentators came to treat expertise and

reformulation of the MQE "broke new ground in administrative law"); Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 (2016) ("[T]he Court in *King v. Burwell* . . . declined to apply the *Chevron* framework altogether."); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2191 (2016) (noting that *King* "has sparked a fresh round of critical examination" of the major questions doctrine).

22. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

23. *Id.* at 842.

24. *Id.* at 843.

25. *Id.*

26. *Id.* at 865.

27. *Id.* at 865–66.

accountability as reasons to assume that Congress intends courts to defer to agencies' statutory interpretations in some cases.²⁸

This intentionalist account of *Chevron* emerged in *United States v. Mead Corp.*, which clarified the scope of *Chevron's* application.²⁹ *Mead's* "Step Zero"³⁰ inquiry requires a court to ask if the agency has been delegated authority to act with the "force of law" and if the agency has in fact so acted when rendering the interpretation being considered.³¹ *Chevron, Mead* held, should apply when both conditions have been met. Otherwise, a court may give an agency's views "Skidmore weight" based upon their power to persuade.³² *Mead* thus treats the question of *Chevron's* applicability as one of congressional intent. The working assumption is that Congress intends for agencies to have primary interpretive authority when it delegates to those agencies the power to adopt policies with the force of law.

B. Majorness Within Chevron: The "Elephants-in-Mouseholes" Canon and Recalibrated Reasonableness Review

Though it had precursors,³³ the majorness inquiry first crystallized in *FDA v. Brown & Williamson Tobacco Corp.*,³⁴ with the Court endorsing what's come to be known as the "elephant-in-mouseholes"³⁵ canon of statutory construction. This canon directs courts to presume at *Chevron* Step One that Congress does not delegate

28. See Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 276–77 (2011).

29. 533 U.S. 218 (2001).

30. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836–37 (2001); see also Sunstein, *supra* note 5, at 187.

31. *Mead*, 533 U.S. at 226–27.

32. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). We adopt Peter Strauss's phrase "Skidmore weight" while continuing to use the more familiar phrase "*Chevron* deference" to refer to the *Chevron* framework, though the term "deference" is not without its difficulties. See Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "*Chevron Space*" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1145 (2012).

33. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986). Professor Cass Sunstein, for instance, traces the major question doctrine's origins to the Court's decision in *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), in which the Justices invalidated an FCC regulation exempting most telecommunications carriers from the tariff-filing requirements of the 1934 Communications Act. Sunstein, *supra* note 5, at 237. Specifically, in rejecting the FCC's position at Step One, the Court emphasized "the enormous importance to the statutory scheme of the tariff-filing provision" and found it "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *MCI*, 512 U.S. at 231. And the Court would cite to its decision in *MCI* when invoking the "elephants in mouseholes" idea in subsequent cases. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); see also *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

34. 529 U.S. 120 (2000).

35. See Loshin & Nielson, *supra* note 5, at 19.

powers of major "economic and political significance" to agencies in "cryptic" statutory text.³⁶ Congress does not, in other words, hide the delegation of elephant-like regulatory powers in the mousehole-like landscape of obscure and technical statutory provisions.

In 1996, the Food and Drug Administration issued a landmark rule regulating tobacco products under the Food, Drug, and Cosmetic Act ("FDCA").³⁷ The FDA's assertion of jurisdiction was an about-face from its previous position on tobacco, and the Court of Appeals for the Fourth Circuit struck it down under *Chevron*.³⁸ Dividing 5-4, the Supreme Court held that the FDCA precluded the FDA from regulating tobacco products.³⁹

In particular, the Court rejected the FDA's interpretation at *Chevron* Step One. As the Court put it, "Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products."⁴⁰ In reaching this holding, the Court explained that its Step One analysis was "shaped, at least in some measure, by the nature of the question presented."⁴¹ The FDA had asserted authority "to ban cigarettes and smokeless tobacco entirely,"⁴² but the Court maintained that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."⁴³ In other words, the FDA had asserted a regulatory authority whose implications were too significant to square with the subtle statutory signals on which the agency relied.

36. *Brown & Williamson*, 529 U.S. at 161.

37. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996).

38. *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 167 (4th Cir. 1998) (using "traditional tools of statutory construction" under *Chevron* to evaluate the FDA's rule), *aff'd*, 529 U.S. 120 (2000).

39. *Brown & Williamson*, 529 U.S. at 120.

40. *Id.* at 160-61.

41. *Id.* at 159.

42. *Id.*

43. *Id.* at 160. The Court did not employ the elephants-in-mouseholes canon without careful consideration of the statutory scheme. Nearly thirty pages of its analysis focused upon the FDCA and subsequent legislation addressing tobacco. In the Court's view, the agency's construction rested on "an extremely strained understanding" of the key text in the FDCA. *Id.* More importantly, the Court concluded that subsequent "tobacco-specific legislation" had precluded the FDA from regulating tobacco. *Id.* at 126. In addition, the Court applied the canon based upon the major consequences of the agency's answer to the statutory question being considered. As the Court again and again emphasized, the FDA had long taken the position that it lacked jurisdiction to regulate tobacco. Its position shifted in 1996 with the rulemaking under review. And the answer the FDA gave in 1996 particularly troubled the Court, which focused upon "the breadth of the authority that the FDA ha[d] asserted." *Id.* In light of the legislative history and the agency's "expansive construction" in 1996, the Court concluded that Congress had already "ratified . . . the FDA's plain and resolute position" that it could not regulate tobacco. *Id.* at 159.

The elephants-in-mouseholes canon made its next major appearance in *Whitman v. American Trucking Ass'ns*.⁴⁴ Among the various issues presented by the case was a straightforward statutory question: Did the Clean Air Act require the EPA to consider implementation costs in setting national ambient air quality standards? Siding with the EPA, the Court answered the question in the negative, going so far as to suggest that the statute “unambiguously bars cost considerations from the NAAQS-setting process.”⁴⁵ Any contrary reading, the Court explained, would have “founder[ed] upon th[e] principle” that Congress does not “hide elephants in mouseholes,”⁴⁶ as it was “highly unlikely” that Congress would have used a few “modest words” to “give to the EPA . . . the power to determine whether implementation costs should moderate national air quality standards.”⁴⁷ The breadth of the regulatory power that the challengers wanted the EPA to exercise was impossible to reconcile with the small and subtle language that was said to support it. Hence, as in *Brown & Williamson*, the Court rejected a posited interpretive position on the ground that its regulatory implications were too “major” to find a home in some isolated and insignificant textual language.

Not all of the Court’s invocations of “majorness” have appeared in the guise of the elephants-in-mouseholes metaphor. In *Massachusetts v. EPA*,⁴⁸ for example, the Court rejected the EPA’s claim that it lacked the statutory authority to regulate vehicular greenhouse gas emissions under the Clean Air Act, with the Justices holding instead that the statute unambiguously required the EPA to exercise that authority. The George W. Bush administration had attempted to leverage the “major questions” exception on its own behalf, claiming that the statute’s failure to grant such a significant regulatory authority in express and unambiguous terms should have ended the issue then and there. But the Court took the “majorness” calculus in the opposite direction, holding that the administration could not rely upon *Brown & Williamson* to “read ambiguity into a clear statute,” particularly where doing so would allow an agency to avoid “curtail[ing] the emission of substances that are putting the global climate out of kilter.”⁴⁹ The implication, in other words, seemed to be that the major environmental consequences of *not* regulating greenhouse gases

44. 531 U.S. 457 (2001).

45. *Id.* at 471.

46. *Id.* at 468.

47. *Id.*

48. 549 U.S. 497, 500–01 (2007).

49. *Id.* at 530.

provided a sufficient reason to reject the Bush administration's artificially narrow reading of the term "air pollutant."⁵⁰ Once again, then, the sensed majoriness of an agency's regulatory position played a role in shaping the assessment of that position's ultimate statutory validity at *Chevron* Step One.⁵¹

Majoriness-based reasoning has also played a role at *Chevron* Step Two. *Utility Air Regulatory Group v. EPA* provides a ready example of the argument in action.⁵² Following *Massachusetts v. EPA*, the Obama administration's EPA concluded that stationary sources of greenhouse gases would need to comply with certain permitting requirements under the Clean Air Act if they exceeded a threshold amount of annual emissions.⁵³ Regulated parties challenged the action and found a receptive audience at the Supreme Court. The statute, the Court held, might not have spoken directly to the precise question at issue, but the agency's actions nonetheless qualified as an "outrageous" power grab that was unreasonable at *Chevron* Step Two.⁵⁴ This was so, moreover, in part due to the major implications of the agency's statutory position: as the Court put it, the "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."⁵⁵ Accordingly, the Court rejected the agency's attempt to claim an "extravagant statutory power over the national economy."⁵⁶

50. See Moncrieff, *supra* note 5, at 595.

51. It is also possible to read *Massachusetts v. EPA* as a straightforward Step One decision in which the Court found the statutory language clear enough to support a concededly "major" regulatory power. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 76 ("The simplest argument is that in *MA v EPA*, unlike in *Brown & Williamson*, the relevant sections of the Clear Air Act were sufficiently clear to override even the combined effect of *Chevron* and the major-questions canon."). This reading finds support, for instance, in the Court's treatment of *Brown & Williamson*, which focused far more on distinguishing the case away rather than leveraging its holding on behalf of the Court's conclusion. Cf. *Massachusetts v. EPA*, 549 U.S. at 530–31 (noting that *Brown & Williamson* involved "at least two considerations that have no counterpart in this case"). Either way, though, the important point is that the *framing* of the majoriness inquiry had everything to do with the presence or absence of statutory ambiguity at *Chevron* Step One; it did not have to do with the question of whether the *Chevron* framework was applicable in the first place.

52. 134 S. Ct. 2427, 2444 (2014).

53. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

54. *Util. Air*, 134 S. Ct. at 2444.

55. *Id.*

56. *Id.* The Court read the EPA's rule as "patently unreasonable" because it raised the threshold emissions level for the permitting requirements from the statutorily specified amount of one hundred or 250 tons per year to one hundred thousand tons per year. *Id.* at 2444–45. By raising the threshold, the EPA addressed the Court's concern that its rule would impose permitting requirements on "millions[] of small sources." *Id.* at 2444. The Court thought that, by raising the

These cases, to be sure, dealt with the variable of “majorness” in different ways, but they all share the important trait of operating *within* rather than outside of the *Chevron* framework. What none of the cases do, in other words, is treat a statutory question’s majorness as a decisive reason to eschew *Chevron* in favor of genuinely de novo review.

This fact becomes especially apparent when one notes that just two years before *King*, the Court rejected an invitation to craft a Step Zero exception for “big, important” questions concerning an agency’s jurisdiction.⁵⁷ In *City of Arlington v. FCC*, the Court declined to recognize a “jurisdictional exception” to *Chevron*, which would have required de novo review of all agency interpretations going to the existence of an agency’s regulatory jurisdiction.⁵⁸ *Chevron*, Justice Scalia explained for the Court, applied no less to “jurisdictional” than to “non-jurisdictional” questions,⁵⁹ and there was no good reason to distinguish between “big, important” determinations, deemed “jurisdictional,” and “humdrum, run-of-the-mill stuff,” deemed to be “nonjurisdictional.”⁶⁰ Rather, Justice Scalia emphasized, “[T]he question a court faces when confronted with an agency’s interpretation of a statute is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.”⁶¹ And although Justice Scalia did not say as much in *City of Arlington*, the Court’s previous “major questions” cases could all be understood in similar terms. Up to this point, in other words, majorness had mattered only insofar as it informed the Court’s assessment of whether an agency had stayed within *Chevron*’s boundaries.⁶² Majorness had never provided a reason to replace those boundaries with something else.

C. Majorness Outside of Chevron: The King Approach

Someday, we suspect, the political furor surrounding the Patient Protection and Affordable Care Act will have died down. Future readers may not, therefore, recall that the ACA, more commonly known as “Obamacare,” was a 2700-page statute pushed through an unusual enactment process that resulted in drafting errors.⁶³ They may not

threshold above the statutory amount, the EPA effectively conceded that its interpretation of the permitting requirements was unreasonable. See *id.* at 2444–45.

57. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1868, 1871.

63. See, e.g., Gluck, *supra* note 19, at 63.

recall the political backlash of Obamacare's critics, the rise of the Tea Party in the statute's wake,⁶⁴ and the scores of attempted repeals of the statute following the Republican Party's subsequent takeover of the House of Representatives.⁶⁵ And they may not remember the many lawsuits filed immediately after the Act's passage or that the Supreme Court, in a series of opinions by Chief Justice Roberts,⁶⁶ left the Act largely intact.

King v. Burwell was one of those decisions. In particular, the Court in *King* rejected a challenge designed to limit the effectiveness of federally established exchanges for the purchase of individual health insurance plans.⁶⁷ The Act requires the creation of a health insurance "exchange" in each state and provides for tax credits to assist low-income individuals and families in purchasing plans on these exchanges.⁶⁸ If it so chooses, a state may create and manage an exchange for its citizens; otherwise, the federal government assumes the responsibility of creating and managing such an exchange on the state's behalf.⁶⁹ The claim presented by the challengers in *King* was that the ACA—owing to some odd and probably accidental language in a definitional provision—did not authorize the IRS to pay out tax credits to individuals who purchased health insurance on these federally run exchanges.⁷⁰ The IRS, in consultation with the Department of Health and Human Services, disagreed with this interpretation and had already promulgated a regulation making clear that all qualifying individuals were entitled to subsidies regardless of whether they purchased their plans on a state-run or federally run exchange.⁷¹ The question thus presented by *King* was whether to uphold the IRS's rule and the interpretation of the ACA that it reflected.

Writing for the Court, Chief Justice Roberts answered the question in the affirmative.⁷² But where many commentators expected

64. See David A. Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 STAN. L. REV. 873, 891 (2014) ("[T]he grassroots' complaint was that the ACA in its entirety exceeded the legitimate role of the federal government.").

65. See Metzger, *supra* note 19, at 1774 (noting the introduction of over fifty pieces of legislation aimed at repealing the ACA).

66. See *King v. Burwell*, 135 S. Ct. 2480, 2483–84 (2015) (holding that the Affordable Care Act permitted tax credits on federal exchanges); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572–75 (2012) (holding that the Affordable Care Act's individual mandate was within Congress's power to tax, but that provisions of the Medicaid program expansion were not valid Spending Clause enactments).

67. *King*, 135 S. Ct. at 2483–84.

68. *Id.* at 2485.

69. See 42 U.S.C. §§ 18031(b)(1), 18041(c) (2012).

70. See *King*, 135 S. Ct. at 2488.

71. 45 C.F.R. § 155.20 (2016).

72. *King*, 135 S. Ct. at 2495–96.

a *Chevron*-focused analysis,⁷³ the Court instead resolved the case in an altogether different manner. The Court acknowledged that the key statutory provision—Section 36B of the Internal Revenue Code—could plausibly be read to foreclose the IRS’s rule, but it also highlighted several countervailing signals within the statutory scheme as supportive of the government’s position.⁷⁴ Thus, it concluded that the statute was “ambiguous” with respect to the question of the IRS’s authority to issue subsidies in connection with federally run exchanges.⁷⁵

What is remarkable about *King* is that the Court’s acknowledgment of and response to the statutory ambiguity occurred entirely outside of the *Chevron* framework. Having characterized the statutory language as ambiguous, the Court went on to explain as a de novo matter why the ambiguity should be resolved in favor of the government’s position.⁷⁶ Normally, of course, the statute’s ambiguity would have meant *Chevron* deference, as the Fourth Circuit had held.⁷⁷ But the *King* Court concluded the question itself was too important to warrant any application of *Chevron* at all. Its explanation for this unexpected move spanned a total of one paragraph:

This is one of those [extraordinary] cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.⁷⁸

In other words, because the question was a major one, it was a question for the Court, and not the IRS, to answer. And that was so even where, as the Court itself acknowledged, the relevant statutory language was “ambiguous.”⁷⁹

73. See, e.g., Chris Walker, *What King v. Burwell Means for Administrative Law*, YALE J. ON REG. NOTICE & COMMENT (June 25, 2015), <http://yalejreg.com/nc/what-king-v-burwell-means-for-administrative-law-by-chris-walker> [<https://perma.cc/GGQ4-28C4>].

74. As the Court explained, Congress didn’t intend “to destroy” health insurance markets, yet interpreting the Act to preclude tax credits on federal exchanges would do just that. *King*, 135 S. Ct. at 2496. And to destroy Congress’s “plan” would be to derogate from the Court’s basic duty, recited again and again since *Marbury v. Madison*, “to say what the law is.” *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

75. *Id.* at 2492.

76. *Id.* at 2492–96.

77. See *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), *aff’d*, 135 S. Ct. 2480 (2015).

78. *King*, 135 S. Ct. at 2489 (internal citations omitted).

79. *Id.* at 2492.

King cited directly to both *Brown & Williamson* and *Utility Air* as supportive of this interpretive move.⁸⁰ Those cases, however, should have received at most a *cf.* citation, as *King* leveraged the concept of majorness in a manner that was different from what its predecessor cases had done. Indeed, there are at least three important respects in which *King's* version of the MQE departs substantially from the "elephants-in-mouseholes"-type reasoning that its predecessor cases reflect.

First, the Court in *King* evaluated majorness by reference to the statutory question in the abstract, rather than by reference to any particular answer that the agency had given. To the Court in *King*, the agency's particular "take" on the statutory question proved irrelevant to *Chevron's* applicability. In its previous "major questions" cases, by contrast, the Court had concluded that the agency was stretching the boundaries of its authority in a manner that carried significant implications for the statutory scheme as a whole. We do not think, for instance, that the Court would have identified a "major question" in *Brown & Williamson* if the agency had disclaimed authority to regulate tobacco under the FDCA,⁸¹ nor do we think the Court would have identified a "major question" in *Utility Air*⁸² if the agency had pursued a less ambitious permitting program. But in *King*, the Court's conclusion of majorness was antecedent to and independent of anything the agency had actually done. On the Court's logic in *King*, any possible resolution of the statutory question would have carried "deep 'economic and political significance,'" and that fact was in and of itself sufficient to bring the MQE into play.⁸³

Second, the Court did not carefully consider the statutory scheme before reaching a conclusion regarding the question's overall significance. Rather, its majorness conclusion derived from the "political and economic significance" of the tax credits themselves, as evidenced by their potential to "involv[e] billions of dollars of spending each year" and "affect[] the price of health insurance for millions of people."⁸⁴ The Court's previous "major questions" cases could at least

80. *Id.* at 2489. *King* also cited *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006), for the proposition that Congress would have not delegated interpretive authority to the IRS because it "has no expertise in crafting health insurance policy of this sort." *King*, 135 S. Ct. at 2489. *Gonzales* can be read to support a major questions exception at Step Zero. But the agency's sweeping claim of authority was but one of several reasons the *Gonzales* Court refused to defer. Unlike in *King*, the *Gonzales* Court carefully parsed the statutory and regulatory scheme before deciding to exercise independent judgment. *See Gonzales*, 546 U.S. at 256–67.

81. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

82. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

83. *See King*, 135 S. Ct. at 2489.

84. *Id.*

point to the existing statutory backdrop as a frame of reference—in *Brown & Williamson*, for instance, the FDCA’s silence regarding tobacco regulation and other statutes’ references to tobacco regulation could be (and were) leveraged to demonstrate a disproportionate “fit” between the agency’s claimed authority to regulate tobacco and the statutory language said to support it.⁸⁵ But in *King*, the majorness inquiry proceeded without any similar form of accompanying statutory analysis. The Court’s previous cases involved both the identification of an “elephant” (i.e., a claim of agency authority) and a “mousehole” (i.e., a statutory framework within which that claim uncomfortably resided).⁸⁶ In *King*, by contrast, the Court saw an elephant roaming the world at large.

Third, the Court in *King* saw majorness as a hard, “on/off” trigger for, rather than a “soft” and nonexclusive guiding factor of, the *Chevron* inquiry.⁸⁷ Indeed, *King* for the first time applied the MQE as a pre-*Chevron* device, citing to majorness and majorness alone as a sufficient basis for withholding judicial deference altogether. Prior cases, as we have already noted, cited to majorness as one of many reasons to lessen the degree of deference afforded to an agency interpretation—either at Step One or at Step Two. But *King* saw the question’s majorness as reason to ignore outright the agency’s views.⁸⁸ Thus, in addition to redefining the MQE’s domain, *King* heightened the MQE’s decisional significance.

85. See *Brown & Williamson*, 529 U.S. at 160–61 (“It is therefore clear, based on the FDCA’s overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.”).

86. To be sure, the *King* Court identified the tax credits as a “key” piece of the Act that was “central” to the scheme’s operation. *King*, 135 S. Ct. at 2489. But many agency cases that come before the Court involve “key” statutory provisions; the Court’s certiorari practice, after all, directs it to consider a case’s national importance. It is error, therefore, to make much of the Court’s references to the tax credit’s importance in relation to the statute itself. Thus, although one might see the Court’s brief statutory references as a careful limitation on the scope of the MQE as it was set forth in *King*, we are more skeptical.

87. Concededly, the Court in *King* did also point to the IRS’s lack of expertise on matters of healthcare policy as rendering the case an “especially” inappropriate vehicle for *Chevron* deference. *Id.* But this argument is little more than a makeweight. As Kristin Hickman has argued, the Court’s reasoning makes little sense on its own terms. See Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56, 57–58. The IRS implements any number of congressional public policy goals, including ones involving healthcare. The Chief Justice’s limited view of the IRS’s expertise proves too much. Among other consequences, it would make the Chief Justice’s rejection of tax exceptionalism in *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44, 55 (2011), more or less incomprehensible. In that case, the Chief Justice held that the normal rules of administrative law apply to the IRS’s statutory interpretations. See Hickman, *supra*, at 57.

88. Indeed, the Court nowhere adverted to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which counsels giving weight to an agency’s views to the extent they have the power to persuade.

Read for all it may be worth, *King* instantiated a new clear statement rule at *Chevron* Step Zero. Unless Congress clearly states its preference for agency resolution, it will be understood to have ousted agencies from their *Chevron* role of resolving statutory ambiguity whenever that ambiguity presents a “major” question.

D. King in the Courts Below

It is possible that the Court meant for *King* to be a one-off exception to *Chevron*. Professor Kristin Hickman, for instance, is certainly right to raise the possibility that the Chief Justice’s colleagues did not “intend[] to embrace the most sweeping interpretation of his views.”⁸⁹ But, as she also rightly points out, “sometimes a decision will take on a life of its own.”⁹⁰ *Chevron* did, after all.⁹¹ And we think it’s more than possible that litigants and lower courts will read *King* for all it may be worth.

In fact, early signs indicate that something along these lines may already be happening. There is a growing stack of briefs and motions in the lower courts arguing that *King* has changed the interpretive landscape by disallowing *Chevron* deference in cases that otherwise would fall firmly within *Chevron*’s domain.⁹² And federal

89. Hickman, *supra* note 87, at 69.

90. *Id.*

91. *Id.*

92. See, e.g., *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 253 (3d Cir. 2015) (“Wyndham submitted a Rule 28(j) letter arguing that *LabMD* does not merit *Chevron* deference because it decided a question of ‘deep economic and political significance.’ Wyndham’s June 30, 2015 Letter (quoting *King v. Burwell*); Complaint in Intervention and Application for Preliminary Injunction at ¶ 54, *Nat’l Fed’n of Indep. Bus. v. Perez*, No. 5:16-cv-00066-C (N.D. Tex. May 19, 2016), 2016 WL 3098094 (“The [*Chevron*] theory is that a statutory ambiguity is an implicit delegation, but questions of ‘deep “economic and political” significance’ are exceptions to the delegation rule.” (quoting *King*, 135 S. Ct. at 2480, 2489)); Complaint for Declaratory, Injunctive, and Monetary Relief at ¶ 62, *Texas v. United States*, No. 7:15-cv-00151-O (N.D. Tex. Oct. 22, 2015), 2015 WL 6395461 (same); Final Opening Brief of Intervenors Dixon Bros., Inc., Nelson Brothers, Inc., Wesco Int’l, Inc., Norfolk Southern Corp., Joy Global Inc., Gulf Coast Lignite Coalition, & Peabody Energy Corp. in Support of Petitioners at *4, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 21, 2016), 2016 WL 1605531 (“[T]he Supreme Court’s decision in *King v. Burwell*, 135 S. Ct. 2480 (2015), makes clear that *Chevron* deference would not apply here anyway.”); Brief in Support of Plaintiffs’ Motion For a Preliminary Injunction, *Oklahoma ex rel. Pruitt v. McCarthy*, No. 15-CV-369-CVE-FHM (N.D. Okla. July 1, 2015), 2015 WL 7894590 (arguing that “two-step *Chevron* framework would not apply here” because the “statutory question” is major under *King*); Amicus Curiae Brief of International Center for Law & Economics and Administrative Law Scholars as Amici Curiae Supporting Petitioners at *3–4, *7, *United States Telecom Ass’n v. FCC*, No. 15-1063 (D.C. Cir. Aug. 6, 2015), 2015 WL 4698404:

[T]he Order should be rejected as exceeding the Commission’s statutory authority and as presenting and addressing major questions—questions of “deep economic and political significance,” see, e.g., *King v. Burwell*, No. 14-114, slip op. at 8 (2015)—that can only be addressed by Congress. . . . Although this court addressed and rejected a

judges are taking note.⁹³ Consider *United States v. Texas*.⁹⁴ In that case, a group of states sued to stop President Obama's deferred action immigration program. The administration defended the program, citing *Chevron*. A federal district court preliminarily enjoined the Deferred Action for Parents of Americans ("DAPA") program, and the Court of Appeals for the Fifth Circuit affirmed.⁹⁵ It took only two sentences for the Fifth Circuit to conclude that DAPA implicated a "major question" under *King*:

DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." DAPA undoubtedly implicates "question[s] of deep 'economic and political significance' that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly."⁹⁶

In its threadbare reasoning, the Fifth Circuit was following the Supreme Court's signals. The court of appeals made an independent, "common sense" judgment of the importance of the question and concluded that it was too important for the agency to answer. And although the Fifth Circuit would go on to apply *Chevron*—assuming "arguendo"⁹⁷ that deference was warranted—we suspect that its estimation of the question's majoriness nonetheless influenced its interpretation of the statute before it.⁹⁸

Consider also a U.S. District Court's recent decision in the case of *U.S. House of Representatives v. Burwell*.⁹⁹ The case involves yet another challenge to the Treasury Department's implementation of the

challenge to the 2010 Order on these grounds, the Supreme Court has in the intervening months decided two cases—*UARG* and *King v. Burwell*—that revitalize the challenge, especially given the 2015 Order's more aggressive posture.

93. See, e.g., *Cnty. Health Sys., Inc. v. Burwell*, 113 F. Supp. 3d 197, 212 n.11 (D.D.C. 2015) ("The Supreme Court recently articulated an exception to *Chevron* that applies in 'extraordinary cases'" (quoting *King*, 135 S. Ct. at 2488)); *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1302 (Fed. Cir. 2015) (O'Malley, J., concurring).

94. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

95. *Id.*

96. *Id.* at 181 (citing *King*, 135 S. Ct. at 2489).

97. *Id.* at 182.

98. The Supreme Court, with eight Justices sitting, affirmed without opinion the Fifth Circuit's judgment by an evenly divided vote. *United States v. Texas*, 136 S. Ct. 2271 (2016). In advancing our proposal, we have in mind a Court able to resolve major questions because it has a full complement of Justices. But we do not think the current vacancy on the Court undermines the force of our proposal that the lower courts should continue to defer to agencies under *Chevron* notwithstanding the MQE; all else being equal, dysfunction in the Judicial Branch strengthens the case for a regime of deference to administrative action. See also *infra* Part IV (discussing the possibility of judicial dysfunction).

99. 185 F. Supp. 3d 165 (D.D.C. 2016).

ACA, this time focused on the question of whether the Department may use permanently appropriated (as opposed to annually appropriated) funds to pay out a particular set of subsidies to insurance companies. The district court did not even mention *Chevron* until the end of its opinion. Only after first explaining why the statute prohibited the relevant appropriations did the district court turn to the agency officials' claim that "'at a minimum' they deserve deference to their interpretation of [the statute]."¹⁰⁰ To this argument, the district court offered the following rejoinder:

The Supreme Court in *King* rejected the agency's *Chevron* argument. The Court had previously recognized that in "extraordinary cases," there "may be reason to hesitate before concluding that Congress has intended [the] implicit delegation" that underlies *Chevron* deference. *King* was "one of those cases" because "tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people." The Secretaries say the same thing about Section 1402 reimbursements. That being the case, "had Congress wished to assign th[e] question to an agency, it surely would have done so expressly." There is no express delegation here.¹⁰¹

As in *United States v. Texas*, the district court would go on to make clear that "[e]ven if *Chevron* deference were warranted, the Secretaries would fail at step one."¹⁰² But its primary argument against the government depended on the court's own judgment that major issues were at stake.

These are only two cases,¹⁰³ and we should be careful not to make too much of them. *King's* MQE was only recently enthroned, and

100. *Id.* at 188.

101. *Id.* (internal citations omitted).

102. *Id.*

103. They are not, however, the only two lower court cases to make mention of *King's* MQE. See also *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1024 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 368 (2016) ("This is not an 'extraordinary' case. *Chevron* applies." (internal citations omitted)); *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 826 (9th Cir. 2016) (Seabright, J., dissenting):

[A]lthough the majority Opinion acknowledges that the term "relating to obstruction of justice" in [the statute] is ambiguous, it refuses to give deference to the BIA's reasonable, permissible, and plausible formulation at *Chevron* step two. But this type of refusal should be reserved for "major" or "extraordinary cases." And unlike *King's* challenge to the Patient Protection and Affordable Care Act, this is not an extraordinary case.

(internal citations omitted); *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1302 (Fed. Cir. 2015) (O'Malley, J., concurring) ("[T]here are times when courts should not search for an ambiguity in the statute because it is clear Congress could not have intended to grant the agency authority to act in the substantive space at issue. This is one of those extraordinary cases."); *Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-00731, 2016 WL 6879615, at *6 n.5 (E.D. Tex. Nov. 22, 2016) (preliminarily enjoining a federal overtime rule under *Chevron* Step One, while noting that "the Fifth Circuit and the Supreme Court routinely strike down agency interpretations that clearly exceed a permissible interpretation based on the plain language of the statute, *particularly if they have great economic or political significance*" (emphasis added) (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015))).

we do not yet know how long or widely it will reign. But it is at least possible that circuit and district court judges will grow increasingly willing to ignore the *Chevron* two-step if and when the questions before them seem major enough. The immediate post-*King* developments indicate that lower courts are grappling with the question of how they should incorporate *King*'s MQE into their own resolution of future administrative law cases. Precisely because *King* broke new ground, it casts uncertainty over the scope of *Chevron*'s domain. The Court may very well have something to say about this uncertainty in the future. But, for the time being, lower courts would best confront the confusion by leaving the MQE in the Court's own hands.

II. THE CASE FOR SUPREME COURT EXCLUSIVITY

We have thus far argued that *King v. Burwell* reflects a substantial rethinking of the MQE, according to which the sensed political and economic significance of a statutory question provides a sufficient basis for altogether ignoring the implementing agency's answer to that question. Notably, however, *King* did not go so far as to overrule *Chevron*, with the Court instead suggesting that *Chevron* should continue to apply with full force in non-"extraordinary" cases.¹⁰⁴ *King* thus raises the critical question of *how* lower courts should go about distinguishing major from non-major questions.¹⁰⁵

One might imagine a variety of complex approaches to this inquiry. At a minimum, it would seem, any such approach would need to identify factors of relevance to the variable of majorness, explain how to evaluate those factors in a given case, develop a mechanism for weighing those factors against one another, define a threshold point at which the weighing process supports a conclusion of majorness or non-majorness, and so forth. Ultimately, however, we believe that the better approach to the question turns out to be much simpler. Rather than attempt to probe majorness on a question-by-question basis, lower courts should conclude that the MQE *never* applies to the statutory questions that come before them.

Why should lower courts adhere to this approach? In a nutshell, we argue that nothing stands to be gained from their doing so, while something stands to be lost. More specifically, lower courts lack the institutional features necessary to further the benefits of the MQE, and any lower court involvement in the exception's implementation will

104. *King*, 135 S. Ct. at 2488.

105. See Hickman, *supra* note 87, at 58 (noting that "[t]he Court's seeming curtailment of *Chevron*'s scope in *King v. Burwell* raises a host of questions for future cases").

inflict unnecessary costs on litigants, agencies, and the courts themselves. Accordingly, the Supreme Court and only the Supreme Court should utilize the MQE as a decisionmaking tool.¹⁰⁶

A. Unrealized Benefits

Our proposal necessarily contemplates circumstances in which the lower courts will extend *Chevron* deference to a statutory question that the Court itself would review de novo. Normally, a disconnect of this sort would provide cause for concern. If the lower courts adjudicate cases in a manner that departs from prevailing Supreme Court doctrine, then those courts will more often generate outcomes that the Court itself regards as erroneous and requiring reversal. If, by contrast, lower courts mimic the Court's approach to resolving statutory questions, those courts will more often render decisions that the Court would have no need to correct. Our proposal would thus seem to impose on the Court the unnecessary work of reviewing decisions that it could otherwise leave undisturbed.

Briefly stated, our response goes like this: however strong the *general* case for vertical uniformity may be,¹⁰⁷ it provides little reason for lower courts to mimic the Court when the *particular* dictates of the MQE are at issue. The major questions exception, we believe, is itself an exceptional rule, and it is exceptional because, unlike most rules, its underlying aims and purposes can effectively be put into practice by only the Supreme Court. Put differently, we think that the MQE operates as an ineffective—if not wholly impotent—tool when the lower courts wield it, and we think that point remains true even under circumstances in which all parties recognize the case as an “extraordinary” one. That being so, lower courts do not in fact obviate the need for Supreme Court review even when they “correctly” identify a statutory question as major and resolve the question without

106. We should emphasize at the outset of this discussion that the target of our analysis is the bolder, “Step Zero” version of the MQE that the Court applied in *King*—a version that points to the significance of *the question itself* as a reason to withhold *Chevron* deference in the first place. We can imagine some circumstances in which lower courts might have good reason to invoke the narrower, elephants-in-mouseholes canon of *Chevron* Step One or to cite the majorness of the agency's answer to the statutory question as a factor of relevance to *Chevron* Step Two. We should also emphasize that our proposal treats the granting of cert as a necessary but not sufficient condition for the MQE's application. We contend only that lower courts should never apply the MQE. We do not contend that the Supreme Court must always do so.

107. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 865–66 (1994) (“[T]he values that inhere in a uniform interpretation and application of law—in particular, I think, the cultural desire for a single authoritative voice within the judiciary—strongly support inferior federal court (and state court) deference to Supreme Court rulings.”).

Chevron—under those circumstances, we think the MQE’s internal logic would still require the Court to resolve the question de novo.

We believe, moreover, that the MQE is exceptional in another respect; namely, it represents the rare rule whose “erroneous” non-enforcement by lower courts should reliably generate corrective review by the Supreme Court itself. This is so on account of the significant degree of overlap that the concepts of “majorness” and “certworthiness” share. If the Court regards a question as important enough to apply the MQE, we think the Court should regard that same question as important enough to require the attention of the Justices themselves. Few, if any, statutory questions will carry a national “political and economic significance” that is sufficiently “deep” to justify an “extraordinary” departure from the *Chevron* framework,¹⁰⁸ but not “deep” enough to warrant an exercise of the Court’s discretionary jurisdiction to decide “an important question of federal law that has not been, but should be, settled by this Court.”¹⁰⁹ If the divided courts in *King*,¹¹⁰ *Massachusetts v. EPA*,¹¹¹ and *Brown & Williamson*¹¹² are any indication, there is reason to think that “extraordinary” statutory questions are also controversial on the merits and likely to garner the votes of at least four Justices for certiorari. Consequently, lower courts gain little—either for themselves, or for the judicial system writ large—by attempting to determine on their own whether the Court would classify a statutory question as major or not.

That is the gist of the argument. But to develop the argument further, we need to think about *why* the Court has adopted the MQE and what it is attempting to achieve with it. This is, unfortunately, a point on which *King* provides little guidance, and we therefore must

108. *King*, 135 S. Ct. at 2489.

109. Of course, the Court doesn’t have the exclusive say-so as to whether a given case ends up on its docket; the parties in that case must actually seek to put it there. And circumstances might sometimes arise in which the parties themselves choose not to pursue (or fail to pursue) Supreme Court review. Under these circumstances, lower court non-enforcement errors might end up “sticking” even where the Court would choose to grant certiorari if it were able to do so.

One response to this objection might posit that “major questions” cases are relatively less likely than the average case to end up in an “unpursued certiorari” posture. But regardless of whether that claim is true, we think the risk of “unpursued certiorari” will always exist, whether or not our proposal is adopted. If lower courts did choose to entertain MQE-based claims, they still would commit errors that might sometimes evade Supreme Court review on account of one or another party’s decision not to petition for certiorari. The likelihood of this contingency strikes us as unlikely to be materially higher or lower in the alternative regime. That being so, the risk of “unpursued certiorari” no more undermines our proposal than it does the general practice of relying on litigants to tee up issues for potential Supreme Court review.

110. *King*, 135 S. Ct. at 2489.

111. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

112. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

speculate somewhat about what the Justices might have had in mind. In so doing, we have tried to be as charitable as we can to the Court, advancing what strikes us as the best set of possible justifications that one might offer on the MQE's behalf.¹¹³ Some of these justifications, we concede, are more persuasive than others; indeed, we suspect that some readers will find all of them to be unsatisfactory and object that we are being too charitable in trying to reconstruct rationales for the MQE. But our aim is not to establish that the MQE itself reflects a good idea; rather, it is to show that the idea—even when presented in its best light—provides no reason for lower courts to involve themselves in its implementation.¹¹⁴

1. Intent

To the extent that *King* says anything at all about the MQE's rationale, its justification appears to rest on an assumption about congressional intent. *Chevron* itself, as the Court in *King* acknowledged, derives from "the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."¹¹⁵ But that theory, the argument goes, might

113. We do not here consider the possibility that the MQE is intended to serve the strategic goal of undermining *Chevron* deference in whatever way possible. In other words, the rationales we consider here are rationales that attempt to make sense of the MQE in light of *Chevron*'s animating presumptions. It may be, of course, that the Court sees (or at least some of its Justices see) the MQE in a more explicitly "anti-*Chevron*" light, intending for the exception to operate as nothing more than a way station on the road to *Chevron*'s ultimate demise. If so, then lower court application of the MQE would indeed help to achieve the exception's true objectives. At the same time, we are hesitant to attribute such a purpose to the MQE absent further guidance from the Court to this effect. And we in any event believe that, to the extent that the Justices harbor doubts about the overall wisdom of *Chevron* itself, they should pursue *Chevron*'s elimination directly, rather than chip away at *Chevron* through the clumsy and indirect mechanism of a doctrine about "major questions."

114. Our overall argument holds true when we focus upon the D.C. Circuit, though its details differ slightly. The D.C. Circuit plays a unique role in administrative law: its judges develop a specialty in the subject during their tenure (or had one coming into the office), and in some cases the Circuit has exclusive appellate jurisdiction over agency orders or rules. See Hon. Douglas H. Ginsburg, *Remarks upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J.L. & PUB. POL'Y 1, 2–4 (2012). If any lower court is in a good position to further the values of the MQE, it might be assumed the D.C. Circuit would be it. But despite its unique features, the D.C. Circuit is not in a good position to implement the MQE. As with other circuits, its precedents are at all times subject to reversal by the Supreme Court, which has consistently shown unease about the aggressiveness of judicial review by the D.C. Circuit. And in most cases the D.C. Circuit's jurisdiction is not exclusive, leading to the type of disuniformity in regulatory policy that is inconsistent with the MQE's underlying concern for settlement. Finally, as should become apparent as our argument progresses, most of the rationales for the MQE are unrelated to the unique features of the D.C. Circuit. But see *infra* Part IV.C (positing a special role for the D.C. Circuit in enforcing a dysfunction-based reformulation of the MQE).

115. *King*, 135 S. Ct. at 2488 (quoting *Brown & Williamson*, 529 U.S. at 159).

require rethinking in cases where the political and economic stakes are especially high.¹¹⁶ We might suppose, in other words, that Congress intends for an agency to fill in the details of technical, low-stakes statutory provisions, but this inference becomes more difficult to sustain where the relevant provisions concern “major” issues of public policy. This intuition, we think, probably best accounts for the Court’s suggestion in *King* that “had Congress wished to assign [the] question to an agency, it surely would have done so explicitly.”¹¹⁷

This rationale strikes us as at best incomplete. The trouble is that it fails to account for the Court’s institutional role in answering the major question posed. The intent-based argument posits that Congress would rather have *its own* preferences prevail over those of an implementing agency when the legislative stakes are high. That premise, we think, is likely correct—indeed, as one congressional staffer put it, legislators do indeed like to “keep all those [major questions] *to themselves*.”¹¹⁸ But a preference for *congressional* resolution of major questions is different from a preference for *judicial* over *agency* resolution of questions that Congress has left open.¹¹⁹

Put differently, “major questions” cases involve instances in which Congress has failed to reveal what its preferences are. And thus it is the *absence* of a clear congressional position that the Court must confront.¹²⁰ When Congress has not specified its position regarding a

116. *Id.* at 2488–89 (noting that “[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation” (quoting *Brown & Williamson*, 529 U.S. at 159)).

117. *Id.* at 2489. This idea also finds expression in then-Judge Breyer’s suggestion that “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.” Breyer, *supra* note 33, at 370.

118. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1004 (2013) (emphasis added); see also *id.* at 1003 (“Our findings offer some confirmation for the major questions doctrine—the idea that drafters intend for *Congress*, not agencies, to resolve these types of questions.” (emphasis added)).

119. Congress might make clear that while it prefers to resolve all major questions itself, it would also prefer courts rather than agencies to step in whenever it fails to do so. We could imagine Congress saying so in a wholesale way by amending the Administrative Procedure Act, or at the retail level in individual statutes. See Kent Barnett, *Codifying Chevron*, 90 N.Y.U. L. REV. 1, 4 (2015) (discussing statutes that prescribe deference standards for the courts to apply). And were Congress to do so, we would of course have no qualms with lower courts proceeding to follow Congress’s instructions. Our argument, in other words, is not that the Constitution bars Congress from directing lower courts, rather than agencies, to resolve statutory ambiguity whenever it involves a major question. Instead, our claim is simply that, in the absence of such action, we see no reason to presume that Congress would wish for lower courts to act in that way.

120. Thus, as Cass Sunstein has put it, the actual choice presented in a “major question” case isn’t so much whether to accept an agency’s resolution of a question or instead to accept the position of Congress; rather the relevant choice is “whether to accept an agency’s resolution or instead to

major issue of public policy, a committed purposivist has no choice but to try to discern who Congress would have wanted to formulate the relevant policy in its stead. And we do not see any immediate reason why the majoriness of a given question would indicate a congressional desire to accord interpretive primacy to courts rather than agencies—especially where *Chevron* itself cuts in the opposite direction.

King's stated justification for applying the MQE thus requires further elaboration; the Court held that “major” questions of statutory interpretation should not trigger *Chevron* deference, but without ever explaining why judges rather than agencies should be the ones that occupy the statutory void. To the extent that *Chevron* rests on a judicial fiction about congressional intent, that is all the more reason for a reviewing court to consider whether it is better situated than an agency to answer a major question. The question thus arises: Might there be reasons to prefer judge-based rather than agency-based resolutions of “major” statutory questions?¹²¹ If so, then the intent-based justification for the MQE would be complete.

We think that such reasons might exist, and we will elaborate further on those reasons in the sections to come. For now, however, it suffices to say that *even if* Congress did wish for the Supreme Court to enjoy interpretive primacy in the resolution of a “major question,” it

rely on the interpretation chosen by a federal court.” Sunstein, *supra* note 5, at 233; *see also* Moncrieff, *supra* note 5, at 612 (questioning the view “that judges should review major questions because reasonable legislators would not want to delegate those questions to agencies” on the ground that “reasonable legislators surely would not want to delegate those questions to judges either”).

121. Congress, it might be objected, has signaled a preference that is inconsistent with our proposal, namely, that lower courts apply the same standards of review of agency action as the Court. The basis for federal question jurisdiction in agency cases is 28 U.S.C. § 1331 (2012), which makes no distinction between the Court and the lower courts, and the standard of review is set forth in 5 U.S.C. § 706 (2012), which provides that a “reviewing court shall decide all relevant questions of law” and “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Taken together, these statutes might be read to signal Congress’s intent that all federal courts must apply the same standard of review when evaluating an agency’s statutory interpretation. In the context of *Chevron*, however, we think this objection reads more into the APA and the general federal question statute than is there. As commentators have noted, “much of administrative law,” including *Chevron*, “is common law.” Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 271 (1986); *see* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1300 (2012) (“The Court’s *Chevron* jurisprudence offers an even clearer instance in which the governing standards for judicial review have been elaborated upon and transformed far from their textual roots in the APA.”). In elaborating a common law of judicial review of agency statutory interpretations, we think the Court has layered a variety of “normative and functional concerns” onto sparse statutory text. Metzger, *supra*, at 1312. Our proposal, which looks to functional distinctions between the Court and the lower courts, is in no greater tension with statutory expressions of legislative intent than *Chevron* itself.

does not necessarily follow that Congress would feel the same way about according the same primacy to a randomly selected panel of appeals court judges,¹²² much less a single district court judge. The Court at least has high public visibility, a resistance to forum shopping, and a distinctive ability to enunciate nationwide propositions of law—all traits that lower courts, even at the circuit court level, are far less likely to manifest. To the extent that an enacting Congress wishes for judicial actors to displace an agency's traditional role in answering major statutory questions, we strongly suspect that Congress has the Justices of the Supreme Court—and not any other Article III actors—in mind.¹²³

2. Nondelegation

Perhaps the MQE makes sense as an indirect means of enforcing constitutional limits on legislative delegations of power. The Article I nondelegation rule may be defunct for the time being,¹²⁴ but the Court can and sometimes does use various non-constitutional rules of administrative law as an indirect means of vindicating nondelegation values.¹²⁵ The MQE might operate as one such side constraint by

122. This assumption about congressional intent might have less force with respect to en banc review, but we think the underlying intuition still holds.

123. Each of the arguments that follows can be understood in one of two ways. First, the arguments might be viewed as standalone justifications for the MQE, which outweigh countervailing (or neutral) considerations of congressional intent. Alternatively, the arguments might be viewed as complementary to the intent-based claims, identifying reasons why Congress might prefer for courts rather than agencies to answer the major question posed. We do not see any significant material distinctions as flowing from these two framings and thus do not differentiate between them in the discussion that follows.

124. See, e.g., Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 119 (2011) (noting the rise and fall of the nondelegation doctrine). But see *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1240–41 (2015) (Thomas, J., concurring) (calling for revival of the nondelegation doctrine).

125. See, e.g., Manning, *supra* note 9, at 228 (explaining *Brown & Williamson* in nondelegation terms and arguing that “enforcing the nondelegation doctrine through the canon of avoidance undermines, rather than furthers, the constitutional aims of that doctrine”). The potential purposes of the nondelegation doctrine include preventing arbitrary lawmaking, see, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 516–19 (2003) (“The Court’s approach to the nondelegation doctrine can be made comprehensible when viewed in terms of arbitrariness . . .”); securing liberty by promoting due process, see, e.g., Criddle, *supra* note 124, at 125–26, 126 n.23 (“This Part develops Professor Rebecca Brown’s insight that the nondelegation doctrine should be viewed primarily as an expression of the Founding Generation’s commitment to republican liberty.” (citing Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1553–55 (1991))); and ensuring political accountability, see, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 11, 14 (1993) (discussing the “blow delegation inflicts against democratic accountability”). Whichever account of nondelegation one prefers, we think Supreme Court involvement is necessary for the MQE to be a tool for indirectly implementing the nondelegation doctrine.

limiting Congress's power to vest in agencies a major policymaking power.¹²⁶

The best version of the nondelegation argument, we think, goes something like this: where Congress creates statutory ambiguity, it delegates to some other institutional actor—courts or agencies, for instance—the power to resolve that ambiguity. Most of the time, as *Chevron* itself makes clear, we can regard this delegation as a permissible transfer of executive authority to executive agencies. So long as the statutory text supplies an “intelligible principle” to guide agency discretion,¹²⁷ agencies can, consistent with Article II, “execute” the law by filling in details that the text has left unresolved. But, the argument continues, some statutory questions are so important that answering them necessarily amounts to an exercise of something more than the mere execution of the law. When, in particular, a statutory ambiguity implicates a “major question,” the resolution of that ambiguity starts to look more “legislative” in character. If so, then according *Chevron* deference to agencies in “major question” cases would authorize them to exercise a “legislative” determination that properly belongs to Congress alone.¹²⁸ And thus, by withholding *Chevron* deference in such cases, courts refrain from validating an exercise of authority that the Constitution disallows.

This nondelegation argument carries intuitive appeal, but it too is incomplete. For one thing, the distinction between “major” and “minor” questions does not well align with the traditional doctrinal distinction between legislative and executive power. The former distinction, it seems to us, goes to the *significance of the consequences* that follow from a given policy determination, whereas the latter goes to the *breadth of discretion* that goes into the making of that determination. A seemingly “major” question, for instance, could still involve a narrow range of discretion and thus satisfy the “intelligible principle” requirement. (Consider, for instance, a statute that requires an agency the authority to impose a year-long, nationwide curfew order when various statutory criteria have been met.) And a seemingly minor question might nonetheless involve a huge range of discretion and thus fail to satisfy that requirement. (Consider, for instance, a statute delegating to an agency the authority to impose a five-minute-long, site-

126. See Gluck, *supra* note 19, at 95 (“A robust major questions doctrine will function as a strong nondelegation presumption.”).

127. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

128. We might especially want to deny Congress the power to “pass the buck” on major questions by delegating them to administrative agencies. See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 270 (2010) (arguing that failure to enforce the nondelegation doctrine has led to “a government of buck-passing”).

specific curfew order “whenever the agency wishes to do so.”) To be sure, the Court could always revise its nondelegation doctrine so as to treat majorness and intelligibility as jointly relevant to the question of whether legislative or executive power has been exercised.¹²⁹ As traditionally conceived, however, nondelegation doctrine provides little support for the intuition that the “legislative” character of a statutory determination meaningfully correlates with its majorness.

But even if a question’s majorness does validly function to heighten nondelegation concerns, the nondelegation argument for the MQE confronts another difficulty; namely, it must explain why the Court’s resolution of the statutory question would avoid the same set of nondelegation principles that beset an agency’s attempt at doing the same thing. The Court is just as much “not Congress” as an agency, so one might regard the Court’s involvement in answering the major question as an equally problematic exercise of “legislative” power by a non-legislative entity.¹³⁰ If so, then the proper judicial response to an unanswered major question should not be *de novo* resolution of the question, as the MQE holds, but rather an invalidation of the statutory provision that brought the question into being.¹³¹

We do not mean to suggest that nondelegation principles apply coextensively across agencies and courts. Powers are, after all, “chameleon-like,” in the sense that they can “take on the aspect of the office to which [they are] assigned.”¹³² Thus, we might identify some reasons for concluding that Article III actors enjoy a greater degree of constitutional leeway to resolve “major” ambiguities of statutory language than do their administrative counterparts within the executive branch. Any such argument, however, must demonstrate relevant institutional differences that show why the federal courts may receive from Congress a delegation of power that federal agencies may not.

In the next two Subsections, we will posit two institutional differences between courts and agencies that might help to complete a delegation-based defense of the MQE. In attempting to demonstrate

129. There are suggestions of this approach in *Whitman*, which distinguishes “sweeping regulatory schemes” from other schemes. See *Whitman*, 531 U.S. at 475 (“But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’”).

130. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 436 (2008) (“Although typically associated with delegations to agencies, the constitutional principles on which the nondelegation doctrine is based apply with full force to delegations to courts.”).

131. Indeed, one might even argue that the invocation of the MQE itself qualifies as an exercise of lawmaking power, and a “potentially” major one at that. *Id.* at 459.

132. *Bowsher v. Synar*, 478 U.S. 714, 749–50 (1986) (Stevens, J., concurring in the judgment).

why a court's resolution of "major questions" poses a less troubling set of nondelegation issues than does an agency's resolution of the same, we also end up demonstrating that the de novo resolution of "major questions" at the Supreme Court level poses a less troubling set of nondelegation issues than does the de novo resolution of "major questions" at the lower court level. The Court is, unlike most other Article III actors, a genuinely national and high-profile public institution, whose role in shaping public policy is widely acknowledged and accepted by the public at large. Its distinctive prominence, coupled with its distinctive ability to settle contested issues of law, might help to show why the Court's resolution of the "major question" turns out to be more constitutionally appropriate than that of a particular administrative body. But that argument does not carry over to other Article III actors. Lower court judges are not appointed and confirmed on the understanding that they will issue the last word on the most pressing political and economic issues of the day, and they generally do not issue nationwide mandates with legally binding effects.¹³³ Thus, just as we might distinguish for nondelegation purposes the pronouncements of an inferior regional agency officer from those of the agency's nationwide head,¹³⁴ so too might we distinguish between the pronouncements of an inferior federal tribunal and those of the entity sitting atop the judicial hierarchy.

Our point is not to suggest that nondelegation values should *forbid* lower courts from deciding any and all statutory questions that carry significant policy consequences. Rather, it is to suggest that *if* one accepts the underlying premises of the MQE's nondelegation rationale, one should regard lower courts' exercise of final, de novo judgment on "major" questions as at least as troubling as the exercise of final, de novo judgment by administrative agencies. To the extent that the

133. For a district court to order nationwide relief presents a variety of legal and prudential concerns. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. (forthcoming 2017). This is why, for example, the Court has required district courts to "take care to ensure that nationwide relief is indeed appropriate" before certifying a nationwide class. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); see also Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 490, 494 (2016) (discussing concerns with "Defendant-Oriented Injunctions" that "enjoin the defendant officials or agencies . . . from enforcing or implementing the challenged provision against anyone in the state or even the nation").

134. See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201–02 (distinguishing among "exercises of . . . authority based on the identity of the final agency decision maker"); cf. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (upholding the Social Security Administration's statutory interpretation after applying *Chevron*); *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) (declining *Chevron* deference for a United States Customs Service tariff classification).

nondelegation rationale carries persuasive force, it must rely on institutional features that only the Supreme Court can be said to possess.

3. Accountability (and Issue Salience)

The “accountability/salience” defense of the MQE would maintain that the judicial resolution of “major questions” is uniquely capable of thrusting those questions into the limelight, thus ensuring a full public airing of the question and, by extension, a likelier revisitation of the question by the public’s representatives in Congress. At first glance, this argument might seem to get things backward. The MQE, if anything, would seem to *undermine* democratic accountability by redirecting the resolution of a major question away from a more politically accountable set of officials within the executive branch.¹³⁵ Nevertheless, the MQE might still foster accountability by increasing the salience of the “major question” asked and the “major answer” given. Put another way, even if agency officials enjoy a stronger set of democratic bona fides than their judicial counterparts, we might prefer for courts to answer those questions if their doing so is more likely to bring the relevant issue into the public limelight. In so doing, the MQE might increase the likelihood that democratically elected officials in Congress will consider the courts’ answer and respond in accordance with democratic preferences.

Thus, for instance, when the IRS first confronted the question at issue in *King* (i.e., whether the ACA authorized the issuance of subsidies to individual purchasers of health insurance on federally run exchanges), its resolution of the question generated little (if any) public attention outside the Beltway. But when the Supreme Court subsequently considered the question, the Justices’ deliberations (along with the Court’s answer to the question) were the subject of intense and pervasive national attention.¹³⁶ By deciding *King*, the Court thus helped to raise the profile of the “major question”; and perhaps in doing so, the Court increased the democratic legitimacy of the answer that it gave. Congress’s acquiescence to *King*, in other words, is now more likely to reflect public approval for, rather than public ignorance of, the answer the Court reached; the same inference might have been more

135. Sunstein, *supra* note 5, at 243.

136. See, e.g., Brianne J. Gorod, *Supreme Court Chief Justice Likely to Back Healthcare Law*, L.A. TIMES (Feb. 26, 2015), <http://www.latimes.com/nation/la-oe-0227-gorod-obamacare-scotus-20150225-story.html> [<https://perma.cc/4CJA-3RTB>] (“When the Supreme Court hears oral arguments in *King* vs. [sic] *Burwell* next week, all eyes will be on Chief Justice John G. Roberts Jr., to try to figure out which way he’s leaning.”).

difficult to draw, however, if *King* had never arisen and the IRS regulation had gone unchallenged.¹³⁷

This argument depends on empirical premises, which may or may not be correct. It is at least unclear whether, as a general matter, judicial review of “major questions” does in fact increase their salience in an accountability-promoting manner, or whether a question’s public salience instead derives from factors unrelated to the identity of the institution that decides it. It is also unclear whether de novo scrutiny of a “major question” is in fact necessary to deliver the salience-increasing benefits of judicial review. (*King*, for instance, would likely have been a high-profile case regardless of whether the Court had applied *Chevron* in resolving it; indeed, the case attracted significant attention well before the Court announced its decision to jettison *Chevron* analysis.) Even if, in other words, courts heighten the salience of statutory issues by choosing to review agencies’ resolutions of those issues, it does not necessarily follow that abandoning the *Chevron* framework is necessary to preserve the increased salience that judicial review confers.

But whatever the correctness of those intuitions, it suffices to note here that the “accountability” argument becomes much weaker when the relevant judicial actor is a lower federal court.¹³⁸ Lower court decisions—precisely because they are lower court decisions—typically command far less public attention than do Supreme Court decisions.¹³⁹ Thus, the idea that a lower court’s exercise of de novo review will usefully raise the profile of a “major question” strikes us as especially implausible. If any judicial body is going to deliver on the accountability-promoting benefits that this particular rationale envisions, it is going to be the only Article III body whose judgments enjoy a consistently high-profile nature.

137. See *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 169 (2001) (counseling that courts should assume “congressional acquiescence to administrative interpretations . . . with extreme care”); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 433 (2012) (considering different arguments for finding interbranch acquiescence).

138. See Bruhl, *Hierarchically Variable Deference*, *supra* note 12, at 752 (“The interpretations the Court did issue might be few enough and salient enough that Congress could fit them on its agenda for possible legislative override—or at least this is much more plausible than it would be for lower-court decisions.”).

139. In general, it is doubtful whether any given federal court decision is particularly salient for most Americans. Indeed, there is evidence that the Court’s own decisions, much less the decisions of lower federal courts, are “largely in domains of moderately low salience.” Frederick Schauer, *Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4, 41 (2006) (“[W]hen we look at the world as ordinary Americans see it, we begin to understand that even when the Supreme Court is at its most influential and most visible, the American people quite often have other things on their minds.”).

4. Settlement

A related rationale for the MQE would point to the value of settlement. On this view, the central problem with agency resolutions of major questions relates to their relatively unentrenched nature.¹⁴⁰ One presidential administration can reverse the regulatory judgments of another administration, and this is no less true where the differing judgments concern contested (but equally permissible) interpretations of ambiguous statutory language.¹⁴¹ Courts rather than agencies should resolve major questions for the simple reason that courts are better able than agencies to render answers that are stable across time.

This argument rests on plausible empirical premises—we have little doubt, for instance, that the Court in *King* ended up “settling” more by resolving the question as a *de novo* matter than it would have settled by upholding the agency’s position as “reasonable” at *Chevron* Step Two.¹⁴² At the same time, the argument’s normative premises may be up for debate; namely, it is not altogether clear why we should desire for *major* questions to receive a more permanent resolution than their non-major counterparts. Perhaps, in fact, something more along the lines of the opposite presumption should be true; the higher the stakes of the policy choice, the less willing we should be to make that choice in an administratively irreversible manner.¹⁴³

But even if the settlement-based rationale for the MQE is valid on its own terms, it once again points to a set of benefits that only the Supreme Court can deliver. The problem is that lower court resolutions of major questions are no less “settled” (and in some respects more unsettled) than agency resolutions of the same. This is so for several

140. The suggestion here is not that agency decisions are unentrenched in an absolute sense. As illustrated by the literature on the ossification of agency rulemaking, for instance, many commentators believe that some forms of agency action are too difficult to modify after the fact. See, e.g., Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–62 (1995) (introducing the problem of ossification of the agency rulemaking process). The point is that relative to legislative action, agency action is more susceptible to future modification by future presidential administrations.

141. See, e.g., Gluck, *supra* note 19, at 95 (“Deference to the agency would have meant that a future IRS could have changed the rule at issue in *King*: such a holding would have kept the *King* debate alive, and the ACA’s future would have continued to be in doubt.”).

142. To be sure, the Court did not need to invoke the MQE if settlement was its goal; a decision at *Chevron* Step One would also have sufficed. But the MQE does at least enable the Court to settle interpretive disputes where the statutory provisions at issue are genuinely ambiguous and are thus non-amenable to a Step One resolution.

143. Indeed, there is a sense in which the settlement-based justification conflicts with the accountability-based justification: whereas the accountability-based argument sees a question’s majoriness as a reason to ensure ample democratic involvement in the reaching of its answer, the settlement-based justification sees its majoriness as a reason to short-circuit what might otherwise be an ongoing political discussion.

reasons. Most obviously, lower court judgments are reversible by the Supreme Court itself—they do not enjoy the benefit of stare decisis when and if the Court decides to take up the statutory question for itself. Equally problematic, lower court judgments enjoy a limited geographic scope of operation. District court precedents extend no further than the particular cases to which they apply, and circuit court precedents—though binding on district courts and future circuit court panels—cannot bind other circuit courts when and if they confront the same statutory issue. Indeed, absent Supreme Court intervention, there arises the very real likelihood of a circuit split on the major question posed.¹⁴⁴ If the aim of the MQE is to furnish a stable and settled resolution of ambiguous statutory language, Supreme Court involvement in the process is all but required.

B. Unnecessary Costs

We have thus far argued that lower courts' implementation of the MQE would do little to further the exception's animating values. To this point one might plausibly respond: "Fair enough, but what's the harm?" The likely pointlessness of the endeavor doesn't necessarily provide a reason to avoid it.

But something more than pointlessness is at stake here. In addition to leaving the MQE's prospective *benefits* unrealized, lower court application of the MQE would be costly to both the lower courts themselves and to various other parties that they interact with. If lower courts must evaluate issues of "majority" for themselves, their doing so will generate decision costs related to the difficulty of specifying and determining the applicability of the MQE, as well as error costs related to the systematic over-enforcement of the exception (and, hence, under-application of *Chevron* deference). When these costs are considered alongside the absence of gains to be had from lower court application of the MQE, the case for Supreme Court exclusivity becomes all the more persuasive.

1. Decision Costs

If lower courts apply the MQE, they must be able to know when to apply it. This will be difficult for them to do. The Court has not attempted to define the line between major and non-major questions, and we think the few indicia it has identified (namely, "political

144. This risk can be addressed partially by rules of exclusive jurisdiction or free use of class actions, transfers, and multidistrict litigation, of course.

significance,” “economic significance,” “extraordinariness,” etc.¹⁴⁵) will be difficult for lower courts to work with in a coherent and predictable fashion.¹⁴⁶ Thus, the most immediate costs that our proposal eliminates are the costs of defining, communicating, and understanding the domain of the MQE.

If lower courts must apply the MQE, then they need some guidance as to how to go about applying it. The Court might try to provide this guidance in concretized, rule-like fashion. That the Court has not yet tried to do so suggests that the possibility of this approach is more theoretical than real. It’s tempting to try to distill the cases into a checklist of characteristics: agency inconsistency,¹⁴⁷ overlapping delegations,¹⁴⁸ the possibility of criminal liability based on the agency’s

145. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

146. See Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 451 (2016) (“[T]he *Burwell* opinion did not explain the bounds of the major questions inquiry, providing little guidance for future applications.”). The point is nicely underscored by comparison of the MQE with other exceptions to *Chevron*. Agencies do not get *Chevron* deference when they interpret criminal statutes or statutes, such as the APA, that they are not “charged with administering.” *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997). Nor do they get deference when they decide that a statute does (or does not) create a private right of action. *Alexander v. Sandoval*, 532 U.S. 275, 288–91 (2001). Applying these exceptions, while not without difficulties, is far more determinate than applying the MQE.

The MQE also layers additional and far greater complexity on top of the *Mead* Step Zero analysis. The *Mead* preconditions to *Chevron* deference are, first, that Congress has delegated authority to the agency to make rules carrying the force of law and, second, that the agency used that lawmaking authority when adopting the interpretation. See *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001). Over time, the lower courts have worked out a set of presumptions under *Mead* by tracking the formality with which an agency acted, tied to the APA’s categories of agency action. See, e.g., Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 677–79 (2014) (noting that “various lower courts have set forth rules of their own concerning more specific categories of agency action” that do and do not satisfy *Mead*’s “force of law” requirement). Thus, *Mead*’s Step Zero analysis, while complicated, does not require what *Chevron* counsels against: an independent, ad hoc judicial judgment about the political and practical stakes of the case as a predicate to deference.

147. Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000) (noting that the “consistency of the FDA’s prior position [on the question of tobacco regulation] bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position”).

148. Cf. *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) (rejecting the Attorney General’s broad authority “given the Secretary [of Health and Human Services]’s primacy in shaping medical policy under the CSA”).

interpretation,¹⁴⁹ the amount of money at stake ("billions"¹⁵⁰) or individuals affected ("millions"¹⁵¹), and so on. But the more concretized the criteria become, the less likely they are to capture the Court's intuitive sense of the major/non-major distinction. We think the Court has resisted "rulification" of the MQE precisely because its underlying intuitions are not easily reducible to rule-like form.

We suspect, therefore, that the MQE will remain a standard. The Court is likely to retain the vague verbal formulation it has repeated in the major questions cases, labeling major questions ones of "deep" or "vast" "economic and political significance."¹⁵² From a lower court's perspective, this standard is not much better than a "use-your-discretion" instruction; any attempt to apply it would entail significant decision costs for lower courts, significant uncertainty for litigants and agencies, and significant costs to the Court, which will be called upon to correct the lower courts' errors.

Our proposal obviates the need for the Supreme Court to do any of this. If the MQE remains the exclusive province of the Court, the Justices can maintain a vague formulation of the exception's scope, without inflicting decision costs on the judges, litigants, and agencies involved in lower court cases. The MQE's applicability at the Supreme Court level will remain unpredictable, but that unpredictability will affect only the small number of cases that the Court decides to hear each year. And the Justices can enjoy an added degree of flexibility in delineating and applying the MQE, knowing that any adverse downstream effects will remain cabined by the exception's nonexistence in the courts below.¹⁵³

The Court's certiorari practice provides an illustrative analogy. The standards for granting certiorari are notoriously unclear, and it is

149. *Cf. id.* at 262:

It would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside the course of professional practice, and therefore a criminal violation of the CSA.

(internal quotation marks omitted).

150. *King*, 135 S. Ct. at 2489.

151. *Id.*

152. *Id.*

153. Our argument, to be clear, is not that the decision costs associated with the MQE are sufficient to justify our proposal of Supreme Court exclusivity. Countless legal standards entail decision costs and that fact alone does not mean that courts should avoid applying them. What makes the MQE unique, we believe, is the absence of upside potential to be gained from lower court application of the exception. It is not, in other words, the prospect of decision costs alone that justifies our proposal; rather, it is the prospect of incurring those costs for no good affirmative reason.

for this reason often difficult to predict whether the Justices will choose to review a case. But the vagueness of these standards does not saddle the lower courts with decision costs, because the lower courts do not play any role in evaluating a question's certworthiness. What is more, we suspect that the Justices do not actually spend much time grappling with these standards on a case-by-case basis, much less attempting to achieve docket-wide coherence across all of their decisions to grant and deny certiorari. Rather, the Justices can "go with their gut" in reviewing petitions for certiorari, without too much worrying about or attempting to control the system-wide implications of such a decision.¹⁵⁴ If, by contrast, lower courts were actively involved in flagging cases for Supreme Court review, we would expect to see a sharp rise in the decision costs associated with the application and development of these standards, not just at the lower court level but also at the Supreme Court itself. What our proposal seeks to do is to make the decision costs associated with the MQE more like the decision costs associated with the granting or denial of cert.

The reduction in decision costs, moreover, would occur not just at the "Step Zero" phase of the *Chevron* inquiry. In addition to obviating the need for courts, litigants, and agencies to argue and/or worry about whether *Chevron* will apply, our proposal will reduce the decision costs that lower courts experience when addressing the merits of a statutory case. The *Chevron* framework, as Professor Tom Merrill has suggested, helps lower courts to economize on decision costs.¹⁵⁵ When reviewing an agency's statutory interpretation, a federal judge does not need to labor to specify the "best" reading of the statute. Instead, she needs only to confirm that the agency's view is reasonable and not clearly at odds with Congress's intent. The MQE, by contrast, increases decision costs by requiring a judge to distinguish major from non-major questions and to identify the best answer to major questions. And thus, by eliminating the MQE from the domain of lower courts, our proposal reduces the

154. See Adam D. Chandler, Comment, *The Solicitor General of the United States: Tenth Justice or Zealous Advocate?*, 121 YALE L.J. 725, 727 (2011) (noting, for purposes of the certiorari standard, that "[t]he Court rarely offers guidance on what it thinks is important, and there is no scholarship that illuminates how the Court uses the 'importance' criterion in practice"); see also H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 221 (1991) ("Fundamentally, the definition of 'certworthy' is tautological; a case is certworthy because four justices say it is certworthy." (quoted in Chandler, *supra*, at 736 n.51)).

155. Merrill, *supra* note 6, at 753 ("*Chevron*'s appeal for the courts rests in significant part on its ease of application as a decisional device."). That is not to deny the difficulties of applying *Chevron*'s two steps. For example, it may be difficult for a judge to accept, and to explain, how an agency's interpretation is a "permissible" though not the "best" one. Breyer, *supra* note 33, at 372-74. But by comparison with de novo review or *Skidmore* weight, *Chevron* reduces decision costs by directing courts to focus upon two questions. Merrill, *supra* note 6, at 753.

incidence of the more mentally taxing analysis that de novo review demands.¹⁵⁶

2. Error Costs

Given the uncertainty of the MQE, we can also expect imperfect lower court enforcement of the exception. And given the inherently certworthy nature of genuinely "major" questions, we can further expect enforcement errors to skew in the direction of over-, rather than under-enforcement. If, in other words, lower courts involve themselves in the application of the MQE, we believe they will inflate the scope of the exception beyond whatever boundaries that the Supreme Court has intended.¹⁵⁷

If the MQE applies in lower courts, lower courts can erroneously apply the exception in one of two ways: (1) they can *decline* to apply the MQE to (and thus review under *Chevron*) a question that the Court itself would regard as "major"; or (2) they can apply the MQE to (and thus review de novo) a question that the Court itself would regard as "minor." If lower courts adhere to our proposal, they will only ever commit the former sort of "over-deferring" error. By never applying the MQE, they will sometimes defer to agency positions that the Court itself would scrutinize de novo, but they will never commit the converse, "under-deferring" error of withholding deference from a question that the Court itself would scrutinize under *Chevron*. That asymmetry might at first glance look troubling, but we do not view it as a significant cause for concern. And the reason has to do with the likely exercise of

156. Our proposal reduces decision costs in another way as well. By reducing the overall incidence of the MQE, our proposal helps to reduce the extent of the decision costs that derive directly from the exception's existence. Among other things, for instance, litigants will far less frequently have to spar over the question whether the MQE applies in a given case, and agency officials can spend less time deliberating over whether a given regulation is likely to qualify as "major" in court. See Monast, *supra* note 146, at 476 (raising the possibility that the MQE will chill agencies from proceeding with rulemaking).

157. Our proposal thus retains *Chevron*'s disciplining function in the lower courts, as described by Peter Strauss. See Strauss, *supra* note 12, at 1118. When applying de novo review, lower courts may interpret regulatory statutes differently than the agencies charged with administering them and differently than each other. Balkanization in national regulatory programs is undesirable for several reasons, including regulatory efficacy and fairness to regulated parties and beneficiaries. Writing in 1987, Strauss observed that the Court's capacity to correct lower court balkanization was under strain, which would make *Chevron* deference attractive as a way to centralize policymaking in agencies. *Id.* at 1121-29. If anything, his insights apply even more forcefully today than in 1987, as the Court takes fewer cases per year than it did then. Building upon Strauss's insight, our proposal would allow the Court to decide major questions in "extraordinary" cases while preserving *Chevron*'s check on variable outcomes in the lower courts. Cf. Pierce, *supra* note 12, at 1313-14 (suggesting the possibility of "[r]educ[ing] or eliminat[ing] deference in Supreme Court decisionmaking . . . [while] retain[ing]" *Chevron* in the circuit courts).

direct Supreme Court review to correct over-deferring errors by the lower courts. By definition, these errors will involve statutory questions that the Court itself would regard as “major,” and we think that most such questions should for that reason reliably trigger the exercise of discretionary Supreme Court review.¹⁵⁸ Thus, while our proposal will sometimes cause lower courts to over-defer under *Chevron*, most of their errors in this direction will yield reliable correction from the Supreme Court.

Under the alternative regime in which lower courts *can* apply *King*, both over- and under-deferring errors are likely to arise. For reasons we have already discussed, the over-deferring errors should continue to trigger reversal by the Court itself. By contrast, the under-deferring errors will less often trigger cert grants (and, hence, reversal). The erroneous invocation of the MQE, after all, will involve statutory questions that the Court regards as “minor” and thus less worthy of a place on the Court’s limited docket. That’s not to say that such errors could *never* occur in certworthy cases, but it is to suggest that—in contrast to over-deferring errors—under-deferring errors will involve questions that are inherently less likely to trigger Supreme Court review. In this regime, then, we can expect to see the Court reliably correcting one set of errors while only sporadically correcting the other set of errors, with the end result being a gradual expansion of the MQE in the courts below. Under our proposal, by contrast, lower courts would only ever over-defer, and most (if not all) of their errors in this direction would receive prompt correction from the Supreme Court itself.

158. We cannot definitively prove, of course, that four Justices will reliably vote to grant certiorari in major questions cases. The concept of majorness is amorphous, and commentators have offered similar observations regarding the Court’s certiorari standards. See, e.g., Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 4 (2011) (noting that “the Court makes its certiorari decisions free of any constraining legislative criteria that might differentiate those cases that merit certiorari from those that do not”). It is therefore possible that some underenforcement errors might go uncorrected, and there would exist a category of cases in which the Court regarded a lower court’s invocation of the MQE as incorrect but nonetheless unworthy of its time. Nevertheless, we have difficulty envisioning any sort of extraordinary cases in which at least four Justices would not and should not wish to have the final say.

The following table summarizes the idea:

Operative rule:	Lower court practice:	Supreme Court practice:	Outcome:
Lower courts may apply the MQE:	Lower courts err by over-deferring (i.e., mischaracterizing actually "major" questions as "minor") and under-deferring (i.e., mischaracterizing actually "minor" questions as "major").	Supreme Court corrects most (if not all) over-deferring errors and only some under-deferring errors.	Material expansion of MQE within the lower courts.
Lower courts may not apply the MQE:	Lower courts err only by over-deferring.	Supreme Court corrects most (if not all) over-deferring errors.	Scope of MQE remains stable.

The foregoing discussion helps to explain why a regime permitting lower court application of *King* is likely to yield error asymmetries, even where the lower courts over- and under-enforce the MQE at equal rates. But the asymmetries would obviously worsen if the lower courts under-deferred more often than they over-deferred. We can only speculate as to what lower court judges would ultimately do, but there is some basis for suspecting that they would tend to err on the side of under-deferring, thus exacerbating the system-wide asymmetry that we have already posited.

Part of the problem may stem from judges' desire to avoid Supreme Court reversal;¹⁵⁹ if a lower court judge knows that the Court is more likely to grant cert in cases involving "major" rather than "minor" questions, the lower court judge would be better off characterizing a borderline question as major rather than minor. Either the judge is correct, in which case the Court is likely to grant cert and also apply the MQE; or the judge is incorrect, in which case the Court is unlikely to grant certiorari in the first place.

159. We assume that the desire to avoid reversal plays at least some role in lower court judges' decisionmaking. See, e.g., Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 63 (2002) ("To the extent that the choice of a judicial instrument affects the ability of others to reverse the court, it becomes a strategic variable in the court's decision."); Andrew S. Watson, *Some Psychological Aspects of the Trial Judge's Decision-Making*, 39 MERCER L. REV. 937, 949 (1988) (describing "[t]he inevitable narcissistic desire not to be reversed" as an important psychological aspect of trial judge decisionmaking). In making this assumption, we recognize that the empirical evidence "is somewhat mixed," with "the majority of recent studies find[ing] that self-interest concerns, such as promotion desires and reversal aversion, influence the decisionmaking of judges with permanent tenure." Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior*, 2011 U. ILL. L. REV. 1753, 1759.

There may be a more complex psychological dynamic to the problem as well. In particular, what the Court said of the jurisdictional/non-jurisdictional distinction in *City of Arlington* might also apply to the major/non-major distinction in *King*:

Savvy challengers of agency action would play the [major questions] card in every case. Some judges would be deceived by the specious, but scary-sounding, [major/non-major] line; others tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands. The effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts.¹⁶⁰

The MQE requires a judge to ask whether the question itself is politically salient and practically important whenever she reviews an agency's statutory interpretation. Asking this question, we suspect, makes it more difficult for a judge to internalize the deference norm that *Chevron* directs. The MQE signals that a judge should let her independent policy assessment be her guide. *Chevron*, by contrast, calls upon a judge to bracket her independent policy judgments, which may be hardest to do when the judge perceives the case to have high political or practical stakes.

If these signaling effects take hold, we can expect more lower court errors in regulatory cases.¹⁶¹ For those who understand *Chevron* in terms of congressional intent, over-enforcement of the MQE will mean that lower courts will decide questions that Congress meant for agencies to decide. And for those who think of *Chevron* in terms of comparative institutional competence, erroneous applications of the

160. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013).

161. The prospect of lower court overenforcement might not be troubling if we assume that the choice between *Chevron* and de novo review does not matter for substantive outcomes. Many administrative law scholars suspect, and some have argued based on empirical data, that the different standards of review do not matter for outcomes in administrative law cases. See, e.g., David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010). We think, however, that *Chevron* has at least modest effects on judicial review in the lower courts, though perhaps not in the Supreme Court. See Kent H. Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808848 [<https://perma.cc/QNG5-9RZZ>] (reaching this conclusion); see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099, 1117–19 (2008) (finding that the Court's choice between *Chevron*, *Skidmore*, and de novo review has a modest or even negligible effect on the rate at which the Court reverses an agency's action); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826, 859 (2006) (concluding that *Chevron* may have a “dampening” effect on ideological decisionmaking in lower courts, depending on panel composition). It follows that a contraction of *Chevron*'s domain in the lower courts through application of the MQE would change substantive outcomes.

MQE are troubling because courts, which lack agency expertise, are more likely to make regulatory mistakes.¹⁶²

These regulatory mistakes by lower courts will, moreover, be more entrenched than under our proposal. Typically, agencies can change course under *Chevron* when circumstances change. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Court held that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."¹⁶³ Thus, when a statute is ambiguous, *and it presents a Chevron-eligible question*, an agency is not bound by a prior judicial interpretation of that ambiguity. This agency flexibility is lost, however, when the MQE applies. *King* directs a court to fix the meaning of an admittedly ambiguous statute when the question is major. An agency cannot deviate under *Chevron* because a major question is not *Chevron*-eligible.

* * *

The MQE, in short, is a rule whose animating values can effectively be furthered by only the highest court in the land, but whose costs will be realized by *any* court in the land. Those two features of the rule, when viewed together, support the conclusion that the MQE should remain the exclusive province of the Supreme Court.

III. SOME OBJECTIONS CONSIDERED

We have thus far suggested that lower court involvement in the MQE's application is unlikely to yield much in the way of benefits while simultaneously giving rise to a variety of unnecessary costs. But we have not yet considered whether our alternative proposal carries some unwarranted downsides. In this Part, we thus consider and rebut six potential objections.

162. *King* signals to lower courts that they should disregard the agency's views entirely, not even giving them *Skidmore* weight. See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (explaining that "our task [is] to determine the correct reading of Section 36B" without referring to *Skidmore* or considering the agency's view).

163. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (emphasis added).

A. Percolation Lost

An initial objection to our proposal involves the familiar “percolation” process through which lower courts contribute to the development of Supreme Court doctrine. Lower court decisionmaking can sometimes benefit the substance of the Supreme Court’s case law, for the simple reason that, as lower courts “apply existing Supreme Court law to new and unforeseen fact patterns . . . , [they] provide a substantial information base for the Court to consider when contemplating further doctrinal reforms.”¹⁶⁴

Our proposal disrupts the percolation process in two ways. First, by preventing lower courts from evaluating the “majorness” of a given statutory question, our proposal limits their ability to contribute to the Court’s implementation of the MQE. Second, by requiring lower courts to decide “genuinely” major questions under *Chevron*, our proposal limits their ability to contribute to the Court’s independent resolution of the major questions themselves. Conversely, if lower courts can and do apply the MQE for themselves, the Supreme Court is more likely to benefit from their input in delineating the criteria of majorness and in resolving “major” statutory ambiguities.

Although we concede that our proposal is likely to carry these consequences, we think that the forgone percolation-based benefits will not be especially great. To begin, the second “merits-based” problem strikes us as especially minor. Just because a lower court has applied *Chevron* to evaluate a question that the Court will review de novo does not mean that the lower court’s statutory analysis will necessarily prove useless to the Court’s analysis. To the contrary, the lower court could develop insights about an ambiguous statute at Step One or Step Two that might still be illuminating to the Court when it resolves the ambiguity for itself. This is, after all, precisely what happened in *King*.¹⁶⁵

As to the forgone percolation of issues related to the scope and substance of the MQE, we think a couple of points are in order. First, because under our proposal the Court would have no need to develop concretized guidance regarding the MQE’s applicability, we do not think that the need for outside input will be especially great. Second,

164. Coenen, *supra* note 146, at 683; *see also* *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 481–501 (2012).

165. In *King*, both the majority and dissenting opinions contained multiple citations to a D.C. Circuit opinion on the statutory question, and they did so even though the D.C. Circuit had considered the question under *Chevron*. *See King*, 135 S. Ct. at 2491 (majority opinion); *id.* at 2501 (Scalia, J., dissenting).

nothing in our proposal prevents lower court judges from using dicta and/or separate opinions for the purpose of noting that a given question strikes that judge as major or non-major. That practice would not much differ from the existing, non-binding mechanisms by which lower court judges “signal” to the Court that it should grant certiorari in a given case, consider reevaluating one of its past precedents, or take some other action that the lower court itself is powerless to pursue.¹⁶⁶ We are thus confident that our proposal still leaves room for the lower courts in other ways to support the Court’s implementation of the MQE.

B. Reliance

Reliance interests provide another potential reason to worry about withholding the MQE from the lower courts’ domain. Disuniformity can always foster uncertainty, and our proposal, it might be said, invites uncertainty by prescribing disuniformity as between the Supreme Court and the lower courts.¹⁶⁷ Suppose, for instance, that an agency has interpreted Law A to permit a contemplated course of conduct, and suppose further that a lower court has upheld the agency’s interpretation as reasonable under *Chevron*. Under our proposal, private parties have no ironclad assurance that the agency’s reading would prevail if and when the Supreme Court reviews it. At the Court, after all, the MQE might justify the withholding of *Chevron* deference, and a de novo reading of the statute might compel a different answer to the statutory question on its merits. Under the regime we propose, litigants would be less able to rely on the lower court’s decision as a definitive statement of what the law allows.

We believe, however, that the reliance-based critique of our proposal proves too much. Ambiguous statutes by their nature create uncertainty, and that uncertainty will pose a challenge to party actors regardless of what our proposal prescribes. Even if lower courts strived to mimic the Court’s application of the MQE, public and private actors would still struggle to predict (a) which particular lower court (and which panel of judges on that court) would decide the issue they care about; (b) whether the lower court would err in applying (or not applying) the MQE to the statutory question at stake; (c) whether,

166. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 685–714 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (signaling through a lengthy dissent that separation of powers questions in the case were “important” and “unique”), *aff’d in part, rev’d in part*, 561 U.S. 477 (2010).

167. See Adam I. Muchmore, *Uncertainty, Complexity, and Regulatory Design*, 53 HOUS. L. REV. 1321, 1329, 1339 (2016) (highlighting the relationship between high and lower courts in discussion of “uncertainty about the content of the law”).

having applied the MQE, the lower court would resolve the statutory ambiguity in the manner the parties preferred; and (d) in the event that (b) or (c) is true, whether the Supreme Court would care enough about the lower court's error(s) to intervene in the case. And that is to say nothing of the myriad other changes in lower court precedent, Supreme Court precedent, regulatory treatment, or statutory text that might in the meantime affect the legality of the contemplated conduct. Uncertainty is already baked into the system of judicial review of agency action.¹⁶⁸ Anything our proposal adds to the mix would be at most negligible.

And that is especially so when one remembers that the MQE—by definition—applies only in “extraordinary” cases. There will not be many cases in which the lower courts will “erroneously” withhold application of the MQE, and when the Court regards a question as major, it quite likely will step in to clear up any uncertainty. Conversely, when the Court declines to review a *Chevron* case, that action will provide reason to think that the Court does not regard the question as major and thus, to some extent, indicate a reduced likelihood of Supreme Court intervention down the road. All of these factors suggest that the reliance-related effects of the Court's decision to label a question as “major” will not depend on whether lower courts have done so as well.

C. Tradition

Wholly apart from reliance interests, another objection would go, we should eschew the vertical disuniformity prescribed by our proposal as too weird to warrant serious consideration from the lower courts. The federal judiciary, this argument would contend, has operated for many years under a regime of strict vertical uniformity, and we should avoid any proposal that would depart from that tradition.¹⁶⁹

Of course, one can always question the wisdom of adhering to tradition for tradition's sake: that something has been one way in the past is hardly a reason not to change it going forward. Ultimately, however, the tradition-based objection to our proposal suffers from a

168. Cf. Ehud Guttel & Alon Harel, *Uncertainty Revisited: Legal Prediction and Legal Postdiction*, 107 MICH. L. REV. 467, 468 (2008) (“Uncertainty is prevalent in legal contexts.”); Kelly Casey Mullally, *Legal (Un)certainty, Legal Process, and Patent Law*, 43 LOY. L.A. L. REV. 1109, 1125–26 (2010) (discussing “conflicting preferences regarding the form of legal rules” as an endogenous source of uncertainty in the patent system).

169. Cf. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 361 (2006) (arguing for the wisdom of tradition when it comes to separation of powers questions).

more fundamental flaw. Simply put, the “tradition” on which it relies is more tolerant of vertical disuniformity than the argument would have us believe.

This point becomes clear once one recognizes that the MQE is a doctrine about the power of a court to override an agency’s reading of its enabling statute. *Chevron* says that when an agency reasonably construes a statutory ambiguity, courts lack the power to displace the agency’s construction with an alternative construction of their own. *King* creates an exception to this rule, directing courts to adopt their own construction of statutes in “extraordinary” cases. We propose that the lower courts should not wield this power even though the Supreme Court might.

This type of vertical disuniformity is part of the federal courts tradition. Vertical disuniformity exists with respect to secondary rules regulating the respective adjudicatory powers of the federal courts. The Supreme Court may overturn its own precedents; lower courts may not.¹⁷⁰ The Supreme Court may establish nationally binding law; circuit courts may not.¹⁷¹ District courts may find facts in the first instance; appeals courts may not.¹⁷² The Supreme Court may declare that a “new rule” of constitutional law applies retroactively to petitioners bringing successive petitions for collateral relief; circuit courts and district courts may not.¹⁷³ Perhaps most on point, the Supreme Court has held that it alone has the power to create “clearly established” law governing the application of constitutional rights—law that, under the Antiterrorism and Effective Death Penalty Act, provides the basis for granting federal habeas relief to petitioners challenging state court convictions.¹⁷⁴ And, although the issue has remained open, the Court has similarly hinted at the existence of an exclusive power to declare “clearly established law” in the context of qualified immunity determinations as well.¹⁷⁵ We

170. See, e.g., *United States v. Nava-Perez*, 242 F.3d 277, 279 (5th Cir. 2001) (“[W]e cannot overrule Supreme Court precedent.”).

171. See, e.g., *United States v. Williams*, 184 F.3d 666, 671 (7th Cir. 1999) (“While we carefully and respectfully consider the opinions of our sister circuits, we are not bound by them.”).

172. See FED. R. CIV. P. 52(a)(6).

173. See *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (noting, for purposes of Section 2244(b)(2)(A) of the Anti-Terrorism and Effective Death Penalty Act, that “[t]he new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court”).

174. See, e.g., *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (“As we have repeatedly emphasized . . . circuit precedent does not constitute ‘clearly established Federal law, as determined by the Supreme Court.’” (quoting 28 U.S.C. § 2254(d)(1) (2012))).

175. See *Reichle v. Howards*, 566 U.S. 658, 665–66 (2012) (assuming “arguendo that controlling Court of Appeals’ authority could be a dispositive source of clearly established law in the circumstances of this case”); see also *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam); Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV.

can think of other examples as well.¹⁷⁶ In sum, if we ask whether different federal courts exercise different degrees (and forms) of judicial power, we very quickly arrive at an affirmative answer.

Hitting even closer to home, vertical disuniformity may already be reflected in *Chevron*'s application on the ground. Professors Kent Barnett and Chris Walker have recently compiled data suggesting that the Supreme Court's "version" of the *Chevron* test affords far less deference to agencies than the lower courts' version of it; simply put, even though all courts purport to apply the same *Chevron* two-step, lower courts are significantly more likely than the Supreme Court to uphold agency constructions when applying that test.¹⁷⁷ Barnett and Walker's findings indicate that our proposal may simply serve to formalize a phenomenon that already exists as a real-world matter.

Moreover, some of the values that explain our system's usual preference for vertical uniformity will be advanced by our proposal. Consider, for instance, *stare decisis*. One justification for the practice of precedent, including binding lower courts to Supreme Court pronouncements of law, is that it reduces "the potential for political decisionmaking."¹⁷⁸ One of our principal concerns about the MQE is its

HEADNOTES 62, 71 (2016) (highlighting "the Court's recent hints that § 1983 plaintiffs may need controlling Supreme Court precedent to defeat a claim of qualified immunity").

176. Indeed, the Court's recent decision in *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012), raises the possibility that the Court has something similar in mind in connection with another *Chevron*-related rule. In that case, the Court confronted a variation of a question it had previously considered in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005); namely, when a federal court construes an enabling statute before the implementing agency construes it, what effect, if any, should the prior judicial construction exert on the subsequent agency construction? In *Brand X*, the Court held that the prior judicial construction should bind the agency "only if the prior court decision holds that its construction follows from the unambiguous terms of the statute . . ." *Id.* at 982. But in *Home Concrete*, the Court nonetheless bound an agency to a prior statutory construction that did not purport to enforce the statute's "unambiguous terms." *Home Concrete*, 566 U.S. 478, 483–84. Different members of the majority offered different justifications for these divergent outcomes, and it is not altogether clear what *Home Concrete* signifies regarding the present-day scope of the *Brand X* presumption. But one possibility, raised by some commentators, is that the applicability of the *Brand X* presumption now depends on whether the prior judicial precedent was issued by the Supreme Court or by a lower court instead. See, e.g., *The Supreme Court—2011 Term: Leading Cases*, 126 HARV. L. REV. 176, 376 n.90 (2012); Wesley Sze, Note, *Did X Mark the Spot: Brand X and the Scope of Agency Overrides of Judicial Decisions*, 68 STAN. L. REV. 235, 262 (2016); cf. *Brand X*, 543 U.S. at 1003 (Stevens, J., concurring) (noting that the *Brand X* rule "would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity").

177. See Barnett & Walker, *supra* note 161 (manuscript at 5); see also Bruhl, *Hierarchically Variable Deference*, *supra* note 12, at 760 (noting that "there are some circumstantial and structural reasons to suspect that the Supreme Court is less deferential than lower courts").

178. Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 637 (1985). We thank Greg Shaffer for discussions of this point.

capacity to foster political decisionmaking among lower courts at the expense of more politically accountable agencies. And our proposal addresses that very risk by limiting the MQE's application to the Court alone.

D. Obedience

A fourth objection to our proposal might appeal to concerns about the Court's ability to *control* the actions of the lower courts; namely, a critic might worry that by instructing lower courts not to apply the MQE, we are opening the door to problematic forms of disobedience that flout a basic principle of constitutional structure. What makes a "supreme" court different from an "inferior" court is that the former gets to tell the latter what to do; any arrangement to the contrary would fly in the face of a basic structural principle that Article III creates. Our proposal might appear to invite the lower courts to defy the Supreme Court by declining to apply an exception that the Court itself applies. That sort of disobedience, the argument goes, runs counter to the hierarchical structure of the federal judiciary and thus must be altogether shunned.¹⁷⁹

One can raise interesting questions regarding the extent to which lower courts can and must adhere to the Supreme Court's commands.¹⁸⁰ But our response to the objection is different and more straightforward: simply put, we do not think our proposal requires the lower courts to contravene anything the Supreme Court has said. The Court has only applied the MQE for itself, and it has not ever required lower courts to do the same. One might characterize our proposal as requiring lower courts to ignore the MQE, but one alternatively might characterize the proposal as requiring lower courts to specify that the MQE encompasses only those questions that the Court itself has decided to resolve. And we would certainly agree that *if in fact* the Court made clear that lower courts must apply the MQE, then those lower courts would become duty-bound to implement this agenda, however unwise it might be.

We acknowledge that this response is unlikely to satisfy those who view the matter as already settled, and so we hasten to add that we have no qualms with other institutions acting to give lower courts

179. See Caminker, *supra* note 107, at 828–39 (canvassing formalist justifications for hierarchical precedent).

180. For a recent entry in the debate, see Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 925 (2016) (suggesting that, while lower courts cannot defy Supreme Court precedent, they can "legitimately narrow [it] by adopting a *reasonable* reading of it").

the green light. We would, for instance, welcome an endorsement of our proposal from the Court itself: the Justices could explicitly permit or even require lower courts to eschew the MQE across the board. We would also welcome congressional intervention along similar lines, however unlikely that intervention might be. Congress might, for instance, specify within individual enabling statutes that lower courts—but not the Supreme Court—must defer to reasonable agency constructions of any “major” questions raised by those statutes, or it might amend the APA to universalize the proposal as a statutory default rule.¹⁸¹ Or Congress might go even further, creating “fast-track” procedures through which lower courts could certify “major-seeming” questions for immediate consideration by the Supreme Court.¹⁸² To be clear, we do not think any of these actions are *necessary* to legitimize the lower courts’ implementation of our proposal; *King*, we think, already gives them all the wiggle room they need. But to the extent that others disagree, we think there remain various ways by which Congress and/or the Court could eliminate any obedience-related concerns altogether.

E. Constitutional Questions as Major Questions?

A further objection might contend that our argument proves too much. Aren’t we arguing that lower courts should stop deciding important public law questions, such that they should leave the resolution of constitutional questions, for example, to the Supreme Court? After all, constitutional questions involve review of government action, and perhaps our argument means that lower courts should defer to political actors about the scope of constitutional rights, leaving more aggressive review for the Supreme Court to apply in appropriate cases.

To the contrary, our arguments for Supreme Court exclusivity apply to the MQE alone. The MQE is unique. And what makes the MQE unique is not the majoriness of the cases it affects, but rather the

181. *Cf.* Barnett, *supra* note 119, at 4 (citing existing statutory provisions that prescribe deference standards for the courts to apply).

182. Such a fast-track procedure would raise an Article III question about the Supreme Court’s appellate jurisdiction in federal question cases. A fast-track procedure that required the lower court first to pass upon the major question would seem to give rise to an “appeal” and thus to comport with Article III’s distinction between the Court’s original jurisdiction and its appellate jurisdiction. *See* U.S. CONST. art. III, § 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . .”). A harder question would arise if Congress directed the lower courts to certify major questions without considering those questions for themselves, but we think there is a strong argument that the Court would exercise “appellate” jurisdiction in this scenario as well, on the theory that the case itself would reside within the lower court’s jurisdiction and only the question would be certified up to the Court.

institutional incapacity of lower courts to deliver on the benefits that the MQE itself might yield. Most rules of public law apply far beyond a small and extraordinary set of inherently certworthy cases and would, without active lower court enforcement, lose much of their real-world force if left to the Supreme Court alone. (Imagine, for instance, the privacy-weakening effects of a regime in which only the Supreme Court could hear Fourth Amendment claims.) Of equal importance, lower courts are no less able than the Supreme Court to promote and vindicate constitutional rights. Lower courts, for instance, can and do promote privacy interests by invalidating unlawful searches; they can and do promote values of fairness and equality when they strike down discriminatory laws; they can and do promote free expression when they strike down restrictions on political speech; they can and do promote values of fairness and due process when they invalidate unlawful convictions; and so forth. But, as we have tried to argue, lower courts would not be able to promote the intent-, delegation-, accountability-, and settlement-related values that the MQE exists to further.

To put the point another way, our argument for Supreme Court exclusivity in no way relies on the claim that lower courts are less capable than the Supreme Court at confronting and resolving legal questions of an apparently major nature. Lots of cases implicate questions that might qualify as major in some sense, and most of those cases remain perfectly amenable to lower court resolution. Rather, our argument relies on the far more limited proposition that *the justifications for withholding Chevron deference on majorness-related grounds* are much more persuasive when the relevant judicial actor is the Supreme Court itself. When a statutory question is major, the Supreme Court can point to certain institutional features that it alone has—e.g., the ability to prescribe geographically uniform law, the ability to raise the salience of regulatory cases, the ability to speak for a national constituency, etc.—as rendering it better situated than an agency to further the values that we think best justify the MQE. Lower courts cannot point to similar features, and thus they have weaker grounds for ignoring *Chevron's* general command. The relevant question, in other words, is not whether lower courts are capable of answering major questions (which they undoubtedly are), but rather whether lower courts can persuasively invoke majorness as a reason to depart from *Chevron* (which, we think, they ultimately cannot). That being so, we do not believe that our position implies anything about lower courts' powers and responsibilities outside of *Chevron's* domain.

F. Unchecked Presidential Power

A final objection to our proposal would assume a more pragmatic point of view. Whatever the conceptual merits of our argument, this objection would posit that the MQE represents a valuable tool for lower courts to use in checking abusive exercises of executive power. Such abuses seem especially likely to occur with a presidential administration whose leader has proposed authoritarian policies that are antithetical to basic norms of American government and who, as one scholar has recently suggested, may not “care[] about separation of powers at all.”¹⁸³ With such a president in office, agencies might be more inclined to leverage “permissible” interpretations of “ambiguous” statutes to pursue harmful, illiberal, or otherwise undesirable activities that we would want the courts to strike down. By confining the MQE to the Supreme Court, our proposal removes one tool for the lower courts to use in checking executive power. If forced to apply *Chevron*, those courts might be made to uphold executive actions that they would want (and have good reason) to invalidate.

Real as the prospect of abusive actions from the Trump administration may be, our proposal concerning the MQE would leave lower courts with a variety of more effective tools with which to address illiberal and authoritarian executive action. For example, to the extent that the relevant concern is about arbitrary policymaking, particularly in a deregulatory direction, we think that “hard look” review under Section 706 of the APA provides a more comfortable avenue for judicial intervention.¹⁸⁴ To the extent that the concern is about procedural fairness, we think that the procedural requirements of the Due Process Clause and the APA (as well as other administrative statutes) will offer a more direct means of redress. To the extent that the concern is about agencies trampling on civil liberties, we suspect that individual constitutional rights and/or structural constitutional principles would offer a readily available check. And that is to say nothing of the variety of ways in which lower courts might leverage *Chevron*’s two steps in the service of pushing back against aggressive executive overreach (including, for example, by appealing to “elephants-in-mouseholes”-like reasoning at Step One or considering majorness as a factor at Step Two). We suppose it is possible for a case to arise in which a genuinely

183. Liptak, *supra* note 15 (quoting Richard Epstein).

184. As Lisa Heinzerling has discussed, application of the MQE tends to favor deregulation by “requir[ing] clear congressional language to enable an ambitious regulatory agenda, but not to disable one.” Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. (forthcoming 2017) (manuscript at 1–2), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757770 [<https://perma.cc/KC2R-66CY>].

Step Zero invocation of the MQE furnishes the only viable means of checking abusive agency action (and in which the Supreme Court itself would be unlikely to grant certiorari and apply the MQE for itself), but we have a hard time imagining just what such a case would look like.

But there is another version of the objection that requires further thought. Abusive agency action may be significant in the *Chevron* context not because it creates a special need for lower courts to apply the MQE, but rather because it *reveals or reflects* a new political reality that undermines the justifications for *Chevron* itself. If agencies are abusing their authority willy-nilly, substituting brute-force and nonsensical assertions of power for the good-faith exercise of policymaking expertise, then the case for deferring to those agencies' constructions of ambiguous statutes becomes considerably more difficult to sustain. *Chevron*, one might claim, presupposes the existence of healthy administrative institutions that are functioning normally against the backdrop of constructive legislative oversight. But where those presuppositions no longer hold, then *Chevron* starts to look more dubious.

One possibility—which we do not rule out—is that the breakdown in basic norms of good governance could become so complete as to make it difficult to justify the application of *Chevron* across the board. And if that happens, then it would no longer make sense to maintain, as our proposal does, that the Supreme Court and only the Supreme Court should apply the MQE. But at that point the wrongness of our proposal would be attributable to the wrongness of *Chevron* itself: we would advocate against lower court deference to an agency in major cases for the same reasons that we would advocate against any court's deference to any agency in any case—no matter how “major” or “minor” seeming the statutory question might be. Indeed, once we have reached that dismal state of affairs, then the MQE will be the least of our concerns: nothing less than a wholesale rethinking of administrative law might well be in order.¹⁸⁵

Outside of that scenario, however, there remains the possibility of screening for and responding to dysfunction on a more incremental, case-by-case basis. *Chevron* itself might constitute the general rule, but courts might treat case-specific indicators of executive-branch or congressional dysfunction as a reason to withhold *Chevron* deference

185. Of course, there is no reason to assume that federal courts will be immune to the same political forces that might lead us to rethink all of administrative law. See, e.g., Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1757 (2013) (“Judges are inside the political system, not outside it.”). Therefore, it is far from clear that the “solution” to a wholesale failure of federal public administration would be found in constitutional or administrative law.

from a particular statutory question. But at this point we have exited the domain of the MQE as *King* conceived it and entered the domain of a new and somewhat different exception to *Chevron*, one under which signs of major political dysfunction, rather than substantive indicators of majoriness, operate as the relevant Step Zero trigger. What such an exception would look like, and how it might operate on the ground, are questions that we consider in the next Part.

IV. MAJOR DYSFUNCTION AND *CHEVRON* DEFERENCE

We have argued that lower courts should not withhold deference from agencies based solely upon their felt sense of the “majoriness” of the statutory question presented by a case. Our argument has depended upon the view that lower courts are not in a good position to vindicate any of the MQE’s stated or apparent animating values and that, in attempting to do so, lower courts will inflict unnecessary costs on a variety of different actors, including themselves.

In this last Part, however, we want to consider a somewhat different basis for withholding deference from agencies—one that focuses not on the “majoriness” of statutory questions of “deep economic and political significance,” but rather on concerns about major political *dysfunction* and institutional breakdowns within the scheme of separated powers. There are hints of this “major dysfunctions” idea in *King* and in prior major questions cases, and we here consider the possibility of making that idea more pronounced. Our preliminary thought is that the development of an explicit “major dysfunctions” exception to *Chevron* could serve useful purposes, especially in the sort of polarized and hyperpartisan conditions that afflict our modern-day political climate. If, however, an exception were to be developed along these lines, it would carry a different, and more complicated set of implications regarding the lower courts’ role in the exception’s implementation.

In Part IV.A we formalize this idea, exploring whether dysfunction in the political branches might create circumstances in which—contrary to the standard *Chevron* calculus—courts become institutionally better suited than agencies to resolve a statutory question. Accepting this idea would not mean jettisoning *Chevron* deference entirely, but it would permit the case-by-case withholding of such deference on dysfunction-related grounds alone. Part IV.B then explains how partisanship and polarization can heighten the risk of political dysfunction, both in times of divided government and in times of unified government, and offers a few reasons why these vulnerabilities are likely to remain particularly acute in the years to

come. Finally, Part IV.C sketches some preliminary thoughts on how a “major dysfunctions” exception to *Chevron* might be implemented across the federal judicial hierarchy.

A. A “Major Dysfunctions” Exception?

In *Chevron*, the Court offered a picture of well-functioning political branches doing what we hope them to do, namely, resolving “competing views of the public interest” through legislation, congressional oversight, and executive rulemaking.¹⁸⁶ As the Court described it, the political branch dynamics revealed an iterative process between Congress and the Executive Branch regarding the regulation of air pollutants in response to changing political preferences and scientific judgments.¹⁸⁷ In the Court’s view, the EPA’s rule “represent[ed] a reasonable accommodation of manifestly competing interests,” which “Congress intended to accommodate . . . but did not do so itself on the level of specificity presented” by the statutory question.¹⁸⁸ Against that backdrop, the Court concluded that federal courts “have a duty to respect legitimate policy choices” by the executive, reminding them that “[o]ur Constitution vests such responsibilities in the political branches.”¹⁸⁹

186. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 848, 866 (1984).

187. The *Chevron* Court sketched the political branch dynamics as follows. In the Clean Air Act Amendments of 1970, Congress tasked the EPA with promulgating National Ambient Air Quality Standards and mandated, among other things, that “new stationary sources” would be subject to performance standards. *Id.* at 846–47. When implementing these standards, the EPA adopted a plantwide definition of the term “stationary source.” By 1975, it was clear that the regulatory scheme was not working quite as planned: many areas of the country had not come into compliance with the statute’s pollution reduction goals. *Id.* The 94th Congress was unable, however, “to agree on what response was in the public interest,” as both chambers passed bills only for the Conference Report to be rejected in the Senate. *Id.* “In light of this situation,” as the Court put it, the EPA published an interpretive rule “to ‘fill the gap’ . . . until Congress acted.” *Id.* at 847–48. Congress acted the next year with the Clean Air Act Amendments of 1977, which the Court read as a legislative attempt “to accommodate the conflict between” economic and environmental interests. *Id.* at 851. Following these amendments, the EPA proposed a rule that would have adopted a “flexible rather than rigid definition” of the statutory term “source” allowing the use of the bubble concept for some purposes. *Id.* at 856. But the EPA changed course in 1980 by adopting a “bright-line rule” limiting the use of the bubble concept based upon two court of appeals decisions. *Id.* at 857. In 1981, the Reagan administration directed the EPA to reevaluate its rule and the agency thereafter adopted the bubble concept, precipitating the *Chevron* case. *Id.* at 857–59.

188. *Id.* at 865.

189. *Id.* at 866 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)). Of course, one can quarrel with the Court’s picture of the legislative- and executive-branch dynamics that led up to *Chevron*. We do not enter that debate, but we do insist that the picture of legislative and executive action that *Chevron* posited differs from the political picture today, including in the area of environmental law. *Cf.* Richard J. Lazarus, *Environmental Law at the Crossroads: Looking Back 25, Looking Forward 25*, 2 MICH. J. ENVTL. & ADMIN. L. 267, 268, 272 (2013) (arguing that

Contrast that view of the political process with the one offered some thirty years later in *King*. In a remarkably realist passage, the Court drew attention to the messy and haphazard process of the ACA's enactment. As the Court explained, "[T]he Act does not reflect the type of care and deliberation that one might expect of such significant legislation."¹⁹⁰ In particular, the Court explained:

The Affordable Care Act contains more than a few examples of inartful drafting. (To cite just one, the Act creates three separate Section 1563s.) Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process." And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement.¹⁹¹

The IRS, the Court reasoned, was not well-equipped to make sense of this statutory mess. To the contrary, it was the Court's duty to do its "best" to make sense of a "legislative plan"—a plan whose clumsy and unorthodox enactment deprived it of the requisite level of clarity and carefulness that the Court would have preferred to see.¹⁹²

One can understand this passage from *King* as picking up on a thread laid down in the Court's previous major question cases.¹⁹³ In *Brown & Williamson*, for instance, there was reason to worry "that the administration ha[d] acted without regard to its continuous

"[t]wenty-five years ago, the nation could legitimately boast of a Congress fully engaged in environmental lawmaking," with "[b]oth Democrats and Republicans work[ing] together to enact sweeping, ambitious federal environmental laws," and that "the last two-plus decades [of environmental lawmaking] can be fairly dubbed congressional 'descent'").

190. *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

191. *Id.*

192. *See id.* at 2495–96.

193. Prior to *King*, Abigail Moncrieff developed a realist account of the major questions doctrine that focuses upon "noninterference" with legislative deliberations. Moncrieff, *supra* note 5, at 593. In some cases, she argued, the major questions doctrine prevents the executive from interfering with Congress's Article I lawmaking function by "restor[ing] a substantive regulatory status quo ante, allowing congressional negotiations to pick up where they had left off." *Id.* at 596. Moncrieff's account makes sense of some of the leading major questions cases, but we note that it rests upon the normative assumption that simultaneous and overlapping lawmaking in the executive and legislative branches is a bug, not a feature, of the separation of powers. *See* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011). Our account, while not inconsistent with Moncrieff's, makes sense of *King*, which did not involve executive "interference" in the way Moncrieff describes.

Our account is also consistent with and builds upon Lisa Schultz Bressman's important discussion of *Brown & Williamson* and *Gonzales v. Oregon*, which links the major questions reasoning of those cases with a requirement that agencies exercise their lawmaking authority "in a democratically reasonable fashion." Bressman, *supra* note 5, at 765. As she explains, the Court had "concrete" evidence in those cases that the executive branch, though formally politically accountable, had "acted essentially by fiat." *Id.* at 766. *King* suggests that this set of concerns might well extend beyond the specter of administration-by-fiat, though it certainly encompasses that type of dysfunction.

commitment of accountable government.”¹⁹⁴ Similarly, in *Massachusetts v. EPA*, there was reason to worry that the agency had deliberately chosen *not* to utilize its own expertise when faced with a problem that demanded it.¹⁹⁵ When read alongside *King*, the cases reflect a vision of policymaking that is far less rosy than the cooperative model that the Court in *Chevron* described.¹⁹⁶ In all of these cases, then, the Court’s “major questions” calculus may have depended as much on the Court’s worries about the health of the political process as it did on the Court’s estimation of the stakes of a given case.

It is not difficult to see how one might pick up on this strand from the Court’s “major questions” case law and spin out of it a

194. Bressman, *supra* note 5, at 782. In that case, the question was one of regulating and potentially banning tobacco products entirely; though there was increasing anti-tobacco sentiment among the public in the 1990s, the Clinton administration’s tobacco rulemaking and subsequent litigation against tobacco manufacturers sparked a “factional” political dispute “[d]riven by powerful political and social pressures.” Jonathan Turley, *A Crisis of Faith: Tobacco and Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 449 (2000). There are two ways to argue there was an accountability problem in *Brown & Williamson*. On one account, the FDA’s tobacco regulation was the result of an aggressive agency interpretation of the FDCA to implement the priorities of the Clinton White House. *Cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2282 (2001). In this account, the President drove the agency to repudiate its long-standing statutory interpretation, one that Congress had relied upon in enacting six different tobacco-related statutes. Another account suggests that the agency, and particularly the FDA’s head, solicited the President’s support as political cover because the agency knew its action would be unpopular. *See* Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 66–75 (2000). In fact, there was widespread opposition to the FDA’s proposed rule from both Democrats and Republicans, as the agency predicted. *See id.* Thus understood, the FDA’s assertion of authority was self-consciously anti-democratic, or at least could have appeared so to the Court.

195. In that case, there was evidence, which the Court apparently was aware of, that the George W. Bush White House had directed the EPA to change its views on greenhouse gas regulation. *See* Freeman & Vermeule, *supra* note 51, at 64. In justifying its decision not to regulate greenhouse gases, the EPA cited the President’s climate change policy and offered a dubious scientific argument to support this policy of non-regulation. *See id.* at 64–65. Most importantly for our purposes, the administration invoked *Brown & Williamson*’s major questions concept to argue that Congress had *not* authorized it to regulate greenhouse gases. Taking that argument head-on, and rejecting it entirely, the Court effectively held that the question of climate change was too important for the agency to answer it based upon the president’s priorities rather than its expertise. *See* *Massachusetts v. EPA*, 549 U.S. 497, 530 (2007). Thus, the Court’s holding in *Massachusetts v. EPA*, which required the agency to consider regulating greenhouse gases, was “expertise-forcing.” Freeman & Vermeule, *supra* note 51, at 64.

196. *King* did not highlight any political dysfunction in the executive branch, but it hinted at concerns about the IRS’s expertise. It’s worth noting that the IRS’s rulemaking “asserted without elaboration” its statutory interpretation. *Halbig v. Burwell*, 758 F.3d 390, 395 (D.C. Cir. 2014), *reh’g en banc granted, judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014). The Court might have thought, as the D.C. Circuit below intimated, that the IRS did not exercise its expert judgment when interpreting the statute, but instead implemented President Obama’s priorities regarding Obamacare. That is not to agree that the IRS’s action suffered from a democratic deficit; indeed, we think on the merits that the IRS, and therefore the Court, got the statutory question correct. But it is to say that *King*’s concerns about the IRS’s expertise fit into the pattern of major questions cases.

dysfunctions-based exception to *Chevron* itself. The theoretical underpinnings of the idea are straightforward. Where political dysfunction manifests itself, *Chevron*'s justifications become considerably weaker, and courts thus have a stronger basis for replacing *Chevron* with either weaker deference or outright de novo review. First is the problem of agency expertise: *Chevron* points to agencies' specialized knowledge and experience in the regulatory area as a reason for judicial deference.¹⁹⁷ Where partisanship and politicization seep into agency deliberations, we might question the extent to which a given interpretation reflects an informed and considered judgment on the part of an expert agency. Such a concern weighed on the Court in *Massachusetts v. EPA*, for instance, in which the Court, in the course of rejecting an agency interpretation of the Clean Air Act, faulted the agency for relying too heavily on nonscientific justifications.¹⁹⁸

Political dysfunction might undercut *Chevron*'s accountability-based justification as well. Appointment and removal by the President, and oversight by both the President and Congress, together endow agencies with a degree of democratic legitimacy that their judicial counterparts do not enjoy, and *Chevron* respects that legitimacy by giving agencies rather than courts the final say on contested matters of statutory interpretation.¹⁹⁹ But when agencies self-consciously attempt to preempt or undermine congressional initiatives, or when agencies take positions that depart substantially from popular preferences, it might be more difficult to accord democratic legitimacy to their present-day actions and even harder to imagine the agency responding constructively to an adverse public reaction.²⁰⁰

B. Political Dysfunction in a Polarized Time

All of which bears special relevance to the politics of today. Although "[s]ome things have not changed much" since *Chevron* was decided in 1984,²⁰¹ the country today is a more polarized place. Ours is an "an era riven by partisanship,"²⁰² marked by hardened party

197. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984).

198. *Massachusetts v. EPA*, 549 U.S. at 533.

199. *Chevron*, 467 U.S. at 865 (pointing to the President's electoral accountability).

200. Bressman, *supra* note 5, at 782–83 ("One inference when the administration ignores congressional or popular preferences is that it is serving the interests of favored constituencies.").

201. Farina & Metzger, *supra* note 19, at 1684.

202. Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1394–95 (2012).

loyalties and intensified political disagreements.²⁰³ Polarization has frustrated the ability of Democrats and Republicans to create “cross cutting” coalitions, which in turn has made “political compromise . . . quite difficult” to achieve.²⁰⁴ These factors have contributed to increased levels of paralysis and brinkmanship within Congress,²⁰⁵ and they raise the likelihood of future legislative difficulties and future political dysfunction in the years to come.

The nub of the concern is presidential power. In a hyperpolarized time, as Professor Thomas McGarity argues, “high-stakes rulemaking” can become a “blood sport,” in which powerful political pressures come to bear on agency decisionmaking.²⁰⁶ Chief among these pressures may be those coming from the White House, which is uniquely well-suited to command agency action during times of intense partisanship. And where this is so, courts might have especially good reasons to be concerned about presidential dominance of lawmaking to the exclusion of agency expertise, congressional intent, or even the preferences of the median voter. Perhaps under such circumstances, courts turn out to enjoy the comparative institutional advantage in shoring up the separation of powers by deciding statutory questions without deferring to the agency’s views.

With its discussion of congressional dysfunction, *King* hinted at partisan political forces that weaken congressional oversight of agencies. Congress, of course, has always been at an inherent disadvantage vis-à-vis the President when it comes to overseeing agencies because it is “[d]ivided into two chambers with very different representational bases, and saddled by the Constitution and longstanding practice with various supermajoritarian hurdles to action”²⁰⁷ But partisanship, particularly under conditions of hyperpolarization and divided government, compounds the disadvantage, further weakening congressional controls on agency

203. See generally Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011). This process, as Sunstein has suggested, has been both caused and affected by increases in both implicit and explicit forms of partisan bias. See Cass R. Sunstein, *Partyism*, 2015 U. CHI. LEGAL F. 1, 3 (2016). For example, nearly half (49%) of Republicans would be “displeased” if their child married a Democrat, and a third (33%) of Democrats would feel the same about their child’s cross-partisan marriage. See *id.* at 4.

204. Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1169–70 (2014).

205. See *id.* at 1175–76.

206. McGarity, *supra* note 19, at 1758.

207. Farina & Metzger, *supra* note 19, at 1685–86.

discretion while strengthening the loyalty of agencies' political appointees to their principals in the White House.²⁰⁸

When Congress is gridlocked, pressure increases on the President to direct administrative lawmaking in order to solve mounting social problems. As the "single public official at the head of the national executive branch," the President has many tools available to her to make policy, including directing the federal bureaucracy.²⁰⁹ Presidential administration may be an efficient and politically accountable way to coordinate administrative lawmaking.²¹⁰ But a White House that seizes the reins might push administrative lawmaking in ways that undermine agency expertise or direct agencies to adopt policies that do not comport with the preferences of the enacting (or the current) Congress. And a divided Congress may be unable to check such administrative actions.

Moreover, the congressional oversight that does occur in a hyperpolarized environment is not likely to foster congressional and executive collaboration to solve social problems. Recall again the collaborative process between Congress and the EPA that *Chevron* posited. In the 1970s and 1980s, Congress amended environmental statutes, like the Clean Air Act, to update them in response to problems observed by the EPA and others.²¹¹ During that time, the EPA would periodically and self-consciously fill regulatory "gaps" until Congress could act.²¹² Contrast that process with the hyperpolarized debate about the ACA's implementation. There is perhaps no better example than the House of Representative's lawsuit to stymie the Obama administration's implementation of the Act, with the Republican-controlled House arguing that the administration had unlawfully diverted appropriations to insurance companies.²¹³ Maybe this congressional opposition is unsurprising; no Republican in either the House or Senate voted for the ACA, and *King v. Burwell* itself reflected a not-so-veiled partisan "effort to pull the [ACA] apart by concentrating on 'bits and pieces of the law.'"²¹⁴ As Professor Gillian Metzger has summarized it, "resistance [to the Act] has an overwhelmingly partisan cast, with the ACA closely identified with President Obama and the

208. Metzger, *supra* note 19, at 1748–57.

209. Seth Davis, *Presidential Government and the Law of Property*, 2014 WIS. L. REV. 471, 475, 487–93 (discussing presidential tools of policymaking, including unilateral action, presidential administration, and presidential leadership).

210. See, e.g., Kagan, *supra* note 194, at 2339.

211. Freeman & Spence, *supra* note 19, at 8–9.

212. See *supra* note 187.

213. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 57 (D.D.C. 2015).

214. Gluck, *supra* note 19, at 63–64.

Democratic Party, and opposition to ‘Obamacare’ being a central Republican rallying cry.”²¹⁵

Of course, the federal government in 2017 is no longer divided, and the associated risks of legislative paralysis, brinkmanship, and interbranch warfare have accordingly subsided. But unified government presents its own set of risks, ones that seem especially acute in light of the authoritarian affinities of the new leader of the executive branch. Donald Trump has “provok[ed] unusual alarm in some quarters about how the imperial power of the presidency might be put to use,”²¹⁶ by promising, among other things, to deport “probably 2 million,” or perhaps many more, undocumented immigrants immediately after taking office,²¹⁷ to order a “total and complete shutdown of Muslims entering the United States,”²¹⁸ and to impose “retribution” upon “any business that leaves our country for another country.”²¹⁹ Under the political conditions of *Chevron’s* time, such initiatives would likely have encountered significant resistance from Congress, and the constitutional scheme of separated powers might have sufficed to circumscribe any attempts to pursue such an agenda through unilateral executive action. But today’s conditions of partisanship and polarization significantly reduce the possibility of meaningful oversight and/or resistance by the President’s co-partisans in the legislative branch.²²⁰ This prospect of weak legislative oversight, combined with the President’s increased power over the bureaucracy, would likely enable the incoming President to leverage the administrative apparatus on behalf of a variety of rash and

215. Metzger, *supra* note 19, at 1774.

216. Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 41 n.48 (2016). As another scholar has put it, it is not clear whether Donald Trump “cares about the separation of powers at all.” See Liptak, *supra* note 15 (quoting Professor Richard Epstein).

217. Bill Chappell, *Donald Trump Says He’ll Deport 2–3 Million People Once In Office*, NPR (Nov. 13, 2016), <http://www.npr.org/sections/thetwo-way/2016/11/13/501921177/donald-trump-says-hell-deport-2-3-million-people-once-in-office> [https://perma.cc/TSE4-PCEU].

218. *Donald J. Trump Statement on Preventing Muslim Immigration*, DONALD J. TRUMP FOR PRESIDENT (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> [https://perma.cc/7M2G-QGLJ].

219. Nelson D. Schwartz, *Vowing to Squeeze Businesses, Trump Has Tactics Challenged*, N.Y. TIMES (Dec. 4, 2016), <http://www.nytimes.com/2016/12/04/us/politics/trump-takes-twitter-aim-at-companies-looking-to-move-jobs-abroad.html> [https://perma.cc/M6HM-ZJHX].

220. Of course, it is always true that Congress will be less likely to provide meaningful oversight during a period of unified government than under a period of divided government. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2329 (2006) (“[W]hen government is unified and the engine of party competition is removed from the internal structure of government, we should expect interbranch competition to dissipate.”). Our observation here is that the polarization exacerbates the problem, by reducing the ideological independence of the President’s co-partisans and increasing the costs of intramural disagreement and/or perceived disloyalty to the party itself.

unconsidered policy proposals—proposals that, in one way or another, might fail to reflect the sort of deliberation, agency expertise, and congressional oversight that *Chevron* itself seemed to take for granted.

Time will tell the full extent of what the new administration will bring (and what future eras of unified or divided government may bring), and—as we have already suggested—if the problem of dysfunction becomes sufficiently widespread, then it may well become necessary to rethink the wisdom of the *Chevron* project in its entirety (to say nothing of many other foundations of modern administrative law). If, by contrast, the problems turn out to be real but sporadic—with some regulations reflecting the “standard operating procedures” of administrative law and others reflecting major dysfunction—then a dysfunctions-based exception to *Chevron* might prove to be a useful and desirable judicial tool.

C. Minor Courts, Major Dysfunctions?

Even if we accept the idea of a “major dysfunctions” exception to *Chevron*, the question arises whether in times of political dysfunction, courts would enjoy any comparative advantage over agencies when it comes to screening for dysfunction and deciding the legal issues around which the dysfunction has occurred. Courts, after all, are subject to their own forms of dysfunction, and their own statutory decisions might sometimes reflect bare-knuckled partisan combat rather than the good-faith application of law to fact. Equally problematic, aggressive implementation of a “major dysfunctions” rule might have distorting effects on Congress. As Professors Daniel Rodriguez and Barry Weingast have pointed out, judicial “efforts at ‘improving’ the political process may have the reverse effect of facilitating polarization.”²²¹ For instance, aggressive judicial review can “reinforce extremism within the contemporary Congress,”²²² exacerbating rather than ameliorating partisan tensions. “Dysfunction” itself, moreover, is an open-ended and manipulable concept, and courts might well use the idea as their own sort of partisan weapon against administrative regulation.

The Supreme Court in particular is a political body, and the Justices’ decisions about statutory questions are hardly immune from partisan politics. In *King*, for example, perhaps the Chief Justice was playing the political long game, rejecting a conservative challenge to the ACA tax credits but expanding judicial power to check progressive

221. Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1254 (2007).

222. *Id.*

policymaking in the executive branch. And indeed, the *King* Court's political long game may have something to do with conservative Justices' suspicion of administrative regulation. Professor Lisa Heinzerling has argued that *King*'s MQE is one of several "power canons" that "make Congress uncertain of the words it must use to set in motion an active regulatory program."²²³ While *King* itself did not disable the ACA, some of the prior major questions cases, such as *Brown & Williamson*, prevented an agency from addressing major social and economic problems, seemingly on the premise that "inaction was the proper course," unless and until Congress clearly authorized administrative regulation.²²⁴

All of that being said, there are several ways in which the Court might attempt to explain its implicit comparative analysis of judicial and agency competencies when it comes to shielding administrative law from dysfunctional politics. The Court has unique expertise in declaring the law in cases of national economic and political significance. It has the benefit of high-quality briefing from the parties in most cases and can rely upon amici to flesh out the practical and political stakes of a case.²²⁵ With its small docket, the Court also has the benefit of time.²²⁶ And, we might think, the Justices have the benefit of the experience that comes with the Court's law declaration function. In some cases, therefore, the Court's competence may meet or exceed that of an agency's. And in those cases where the Court suspects either (a) that legislative dysfunction has obscured the meaning and significance of a legislative "plan"; or (b) that the agency's interpretation of that plan reflects an all-out capitulation to politics rather than a genuine exercise of expertise, it may rightly exercise independent judgment to answer the statutory question for itself.

In addition to comparative expertise, the Court might also argue that, when accountability-related "danger signals"²²⁷ indicate a breakdown of oversight or a hyperpoliticization of agency action, its democratic pedigree compares favorably with the agency's. The Supreme Court can claim, for instance, "to have been democratically authorized to make national policy."²²⁸ The nomination and appointment of Supreme Court Justices is visible on a national stage. We understand that the Justices will declare the law in cases of deep

223. Heinzerling, *supra* note 184 (manuscript at 51).

224. *Id.* (manuscript at 39).

225. See Bruhl, *Hierarchically Variable Deference*, *supra* note 12, at 740–41.

226. See *id.* at 740.

227. Bressman, *supra* note 5, at 782.

228. Bruhl, *Hierarchically Variable Deference*, *supra* note 12, at 747.

national significance, and that's why they are vetted for "their views of wise policy."²²⁹ That does not mean the Court is more responsive to majoritarian preferences than an agency, though some scholars have argued the Court never strays too far from public opinion.²³⁰ But it would at least mean that when the other branches find themselves roiled in political turmoil, the Court can claim some sort of popular mandate to come in and attempt to clean up the mess.

Finally, and related to the previous point, the Court might claim a distinctive institutional ability to terminate an otherwise unhealthy political dispute. As we have already noted, one administration's resolution of statutory ambiguity does not foreclose the possibility of a future administration's reversal. The prospect of such a reversal might figure prominently in presidential politics, with candidates vowing either to undo or maintain the contested agency action as part of their respective campaign platforms. That possibility may not be troubling in and of itself, but it might become troubling where the underlying issue is one that implicates or exacerbates dysfunctional oversight in Congress or future dysfunctional decisionmaking within the agency. And under those circumstances, the Court's ability to close off the debate might well look like a comparative institutional virtue.

Supposing, then, that the Court has the institutional features necessary to effectuate a dysfunction-based exception to *Chevron*, we must next ask—in the spirit of the foregoing discussion—whether lower courts possess the same institutional features as well. Here, we think the calculus is considerably more complex than the one we considered in connection with the MQE. To begin with, and in contrast to the MQE, lower court enforcement of a dysfunction-based exception to *Chevron* does have the potential to further *that* exception's goals—namely, that of reducing or deterring dysfunction within the political branches. After all, the greater the number of courts that withheld deference from agencies on dysfunction-related grounds, the greater the incentive that agencies would have to adhere to norms and conventions of good governance—however those norms might be defined. Thus, in contrast to the MQE, a major dysfunctions-based rationale would, we think, implicate values and objectives that the lower courts were institutionally well situated to promote.

On the other hand, we might nonetheless worry about the lower courts' *ability* to screen for and police against dysfunction in a reliable, transparent, and definitive manner. Political dysfunction is not a self-

229. *Id.* at 746.

230. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

defining concept, and lower courts may lack the expertise, political involvement, and nationwide mandate that may be necessary to flesh out its meaning. For example, with regard to institutional expertise needed to screen for dysfunctional politics and to displace “dysfunctional” agency interpretations with *de novo* interpretations of statutes, the Court’s experience and expertise might not extend to the lower courts, where “[t]ime is short,” “[t]he quality and effort of the advocates is uneven,” and “[a]micus briefs . . . are quite rare.”²³¹ So too for democratic pedigree. Lower court appointments are less visible than Supreme Court appointments. They often reflect state-level concerns, such as when Senators press for nominations to satisfy their constituents. The differences between district court appointments and Supreme Court appointments is particularly stark. And precisely because “Supreme Court Justices have a stronger claim, as compared to lower-court judges, to have been democratically authorized to make national policy,”²³² we might be nervous about extending lower court judges too much leeway to make broad, nationally salient pronouncements about the presence or absence of dysfunction within national politics.

Further complicating matters, not all lower courts may be alike for purposes of implementing a “major dysfunctions” exception to the *Chevron* test. Consider, for instance, the Court of Appeals for the D.C. Circuit. Even if we were *generally* hesitant about giving lower courts a role to play in policing for breakdowns in agency governance, we might nonetheless feel comfortable about according the D.C. Circuit an elevated role. The argument would go like this: by virtue of the D.C. Circuit’s docket, which is stuffed with administrative law cases, the D.C. Circuit’s judges develop a keen sense for distinguishing between typical and dysfunctional administrative lawmaking. And, by virtue of its docket, the D.C. Circuit regularly adjudicates appeals of major administrative actions, giving its judges a particular familiarity with how agencies can and should address major statutory questions.²³³ And by virtue of its location and wide-ranging jurisdiction over administrative cases, the D.C. Circuit may have a greater claim to national (as opposed to merely regional) policymaking authority. We have serious concerns about the difficulties of implementing a dysfunctions-based exception to *Chevron*, not the least of which is the difficulty of distinguishing “dysfunctional” from “run of the mill” politics in a principled manner. But to the extent that we are comfortable with

231. Bruhl, *Hierarchically Variable Deference*, *supra* note 12, at 742.

232. *Id.* at 747.

233. See Ginsburg, *supra* note 114, at 2–4.

according such an authority to the Supreme Court, the D.C. Circuit might be similarly institutionally situated to exercise a similar form of authority as well.²³⁴

Our thoughts on all of these matters are tentative, and much more work is required to figure out precisely what a “major dysfunctions” exception to *Chevron* might look like, whether such an exception would be desirable, and how such an exception might operate on the ground. But we do firmly believe that acknowledging the heterogeneity of the federal judiciary and being open to the possibility of inter-court variability in the implementation of administrative review standards will facilitate rather than frustrate careful thinking about this particular issue, along with many others. And that is, in a sense, the most important takeaway of the specific proposal that the bulk of this Article has set forth: whatever one’s views of the MQE, and of our specific proposal concerning its exclusive application by the Supreme Court, we hope at least to have demonstrated that rigid uniformity in the application of substantive standards need not be viewed as an inevitable feature of federal court adjudication. Much to the contrary, we believe that by acknowledging and responding to the differing institutional capabilities of the Supreme Court and its subordinates, we will be better situated to develop workable and effective rules of administrative law.

CONCLUSION

It would be too much to say that there are no major questions in minor courts. But we have argued that lower federal courts should assume precisely that when applying the *Chevron* framework, treating the domain of *Chevron* as unaffected by their independent (and inevitably political) judgments of a case’s importance. The impulses behind the expansion of the MQE are understandable. But if we are going to redirect questions of “deep ‘economic and political significance’ ”²³⁵ from agencies to courts, then we think they should be shifted to the one court that is most like an agency.²³⁶

234. Bruhl, *Hierarchically Variable Deference*, *supra* note 12, at 761 (“To the extent the D.C. Circuit is a ‘junior varsity’ Supreme Court in terms of its institutional context and competencies, reduced deference vis-à-vis other lower courts is defensible.” (internal quotation marks omitted)).

235. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

236. See Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1249 (2011) (“[I]n relying on amici, the Court acts like an agency—but not quite.”).
